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A
COMPARATIVE VIEW
OF THE
DIFFERENCES
BETWEEN THE
ENGLISH AND IRISH
STATUTE and COMMON LAW.

IN A
SERIES OF ANALOGOUS NOTES
ON THE
COMMENTARIES OF SIR W. BLACKSTONE.
WITH AN
INTRODUCTION

Fully discussing the CONTESTED POINT of the POWER
of the BRITISH PARLIAMENT to bind IRELAND.

VOL. I.

BY WILLIAM THOMAS AYRES, Esq.
OF THE MIDDLE TEMPLE.

Ο Βίος Ερανος ὁ δὲ Κερδος οὐκ ἔστι. HIPPOCRATES.

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9

COMPTON



TO THE
RIGHT HONOURABLE
JOHN SCOTT, Esq.
HIS MAJESTY'S ATTORNEY-GENERAL
OF THE
KINGDOM OF IRELAND,
REPRESENTATIVE IN PARLIAMENT
FOR
MULLINGAR,
AND ONE OF THE
PRIVY COUNCIL OF THIS KINGDOM.

SIR,

THE very honourable rank you
hold in the law department in this
country would appear a sufficient
reason

reason for offering a legal treatise to your patronage; I am happy that public propriety indulges me in thus testifying to you my respect, by inscribing to you the following work.

THE reason that prompted this undertaking, was, that I considered it an indispensable duty of every legislature to promulge such laws as they have formed; for as ignorance of the law cannot be set up as a justification of a transgression, there is certainly an unequitable severity in punishing a man for doing that
which

which he did not know to be illegal, and many things are illegal which are not in themselves criminal. The common mode of publishing statutes is inadequate to this end; they are too voluminous for the people at large, and they remain as a dead letter, producing little or no effect upon manners or morals. In Ireland, multitudes are sunk in barbarous ignorance; the jurisprudence of the country is overloaded with laws co-ercing the natural rights of individuals, and of the community; and some of these laws have been made in England without the know-

knowledge of the Irish. Caligula, the Roman emperor, caused his laws to be written in small characters, and hung on high pillars; the people of Ireland, for many years, have been in the same predicament with the Romans. *Laws have been made to bind them by foreign jurisdictions:* laws have been multiplied, but they have not been either digested or promulged in such order as to enable the people to distinguish their privileges, or to pay proper obedience either to the laws, or the magistrate.

IN

IN this Book which I have the honour to lay before you, I have attempted to remove the great national inconvenience which arises from ignorance of the law, by contracting within a small circle, the common and statute laws of Ireland, which, I trust, will promote the two great purposes of facilitating the labour of the student, and spreading information among my countrymen.

THE generosity of mind for which you are so eminently distinguished, makes me hope you will patronize a work written with the best intent; for my utmost ambition is to prove myself

[x]

myself serviceable to the public, and
to demonstrate, with how much re-
spect, I am,

S I R,

Your most obedient,

and devoted

humble Servant,

W. T. AYRES.

DUBLIN,
Nov. 15, 1779.

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INTRO-

INTRODUCTION.

WHILST most of our law writers strongly urge the necessity for every man to understand the laws of his own country; they confess, at the same time, that the attainment of that knowledge is greatly impeded by the many difficulties cast in the way of the students, by the usual harshness of style, and a spirit of quaintness, almost peculiar to the teachers of that profession.

THE mode of treating law subjects causes a reluctance in gentlemen to apply to the study, since many authors, from whose great abilities method and perspicuity might have been expected, have rather embarrassed than elucidated. They have indeed opened the channel, but they have rendered the water unpalatable. Tho' they have pointed out the road in which travellers should tread, they have not removed the briars, which impede their passage; but have disheartened

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a

them,

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them, by saying the path is rugged at the beginning, without giving them any hopes, that it would prove more easy as they proceeded.

LONG had the students of the law laboured under these discouragements, when Sir William Blackstone, (on whose Commentaries this work is founded,) nobly dared to depart, from the dry embarrassed mode of writing; warranted by custom, and sanctified by antiquity. He first adopted a fluency of style, and purity of diction, capable of uniting pleasure with instruction, and inviting almost every man to become acquainted with the principles of law, which he first properly methodized, and united to reason. It is true, he has contradicted in the house of commons, some of his written assertions^a: It is true, he has boldly and questionably maintained that “The power and jurisdiction of parliament is so transcendant and absolute, that it cannot be confined for causes or persons; it can in short do every thing, not naturally impossible, and therefore, some have not

(^a) Junius, v. 1. p. 115.

“scrupled

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“scrupled to call it by a figure rather too bold, the omnipotence of parliament. “True it is, that what the parliament doth, “no authority on earth can undo ^b.” Points which law critics, acquainted with the constitution of these countries, may successfully controvert; yet his Commentaries lay a just claim to the highest respect, in regard to the student, who ought to be minutely informed in these particulars; if not, to the public at large, whose œconomical principles of reading, may prevent them from weighing and investigating these points.

BUT if the study of the law is rendered more easy to the English student, by its being thus methodized, yet the difficulties to the Irish, are very numerous.—Altho’ the constitution of Ireland, when first *adopted*, was exactly similar to that of England, and the principles and maxims of Irish jurisprudence, coincident with the English common law, yet material differences in both, have arisen in process of time, from necessity and accident.

A COMPETENT knowledge of these differences is essential to every barrister; but it

(^b) Black. Com. vol. 1. p. 160.

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too frequently happens, that gentlemen arrive at the bar, founded with an ignorance of that differential code, with which they ought to be so peculiarly acquainted; after a severe application to the study of the English law. This fatal error, highly blameable from its particular circumstances, and unpardonable from its tendency, subjects the man to the greatest censure who destroys his own reputation, and wantons with the lives and fortunes of his too credulous clients, from an ignorance that cannot be justly pleaded, since *regula est, quiddam ignorantiam cuique nocere.*

THE intention of this work, is to obviate inconveniences dishonourable to the profession, injurious to the clients, and disgraceful to the Irish courts; and to facilitate the necessary studies of the Irish student; and if it excites some more able lawyer to improve on this subject, the design of it will be complete.

To render more clear the differences between the English and Irish law, and make the causes whence they have arisen more apparent, it will be necessary to premise
some

INTRODUCTION. ▼

Some observations on the right claimed by the English legislature to bind by British laws the kingdom of Ireland. * This subject hath been frequently discussed, and such an almost universal prepossession hath prevailed in favour of that right, that whoever stands up at this time to support the negative principle, will doubtless be deemed by the servile advocates for Irish dependance, as but an idle reasoner; he will be told, "it is unpardonable to affect singularity, "and it is folly to oppose an invidious "power, our superior in strength." But, tho' we should submit to the first, and the second is not openly avowed, yet our private

* The most spirited treatise on this subject, was written in the beginning of the reign of K. William III. by Mr. Molyneux; but as since that time there have many alterations and provocations arisen, which have almost changed the nature of the claim; a revision and further comment, may not be improper at this critical æra. This publication was burned by order of the house of lords in England; but, like the Arabian bird, it rose with redoubled vigour from its own ashes. So long as the Irish possess judgment to admire, and resolution to protect their rights, its sentiments will ever be regarded. The principles of Guatimozin (a small pamphlet lately published) are well worth the attention of the public; but, tho' it is an admirable production, yet it is very superficial on this question.

sentiments

sentiments cannot be abridged by the one, nor can the other prevent them from militating against a restraint repugnant to our nature; it is a thesis that may perhaps excite the malice of some; but he who writes in a spirit of investigation, not influenced by a narrow or illiberal prejudice, will join with Cicero, "*hoc animo semper fui, ut invidiam virtute partam, gloriam, non invidiam putarem*"^d.

IN the spirit of these reflections, a candid disquisition of laws passed by a legislature not convened by those very people who are to feel their force, will be submitted to the public.

WHEN such an high and important subject as the right of the legislature of one kingdom to make laws to bind another, is discussed, it should be treated with all possible delicacy and respect. But though this enquiry shall be made with all the deference due to such high authority, yet the animated independence and decent freedom, which

^d See 1st Oration against Catiline.

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ought to influence the language of every Irishman, shall not be forgotten.

THIS enquiry naturally branches out into four distinct heads.

I. THE cause and intention of society.

II. THAT no legislative power, but such as is chosen by the people, can *lawfully* make laws to bind them.

III. That laws made by any other power are invalid. And,

IV. THAT, although Ireland is dependent on the crown of Great Britain, it is not of right, or in consequence, on its parliament; which can bind Ireland in no other manner than it does other nations, by prohibiting the importation of foreign goods into their country.

I. IN a state of nature man was a free agent, capable of directing his conduct by his own will, and unaccountable to all men for such conduct, so long as he refrained from violence to others: he had no laws but those of nature, to inhibit him from what he pleased to do, and these only extended

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tended to confine him to the preservation of his own life, and of the lives, liberties and properties of his fellow-creatures.

THIS universal and indiscriminate power placed every man on an equality, in respect to his right of acting, but as it admitted of no superiority, it forbade an exertion of impartial justice, to determine in any contest, which was the injured party; and as the desire of vengeance is the first and almost only principle instilled in the mind of a savage*, force overcame right, and the decision depended more on the strength of the disputant, than on the equity of the claim. Somewhat similar to this, was the ancient superstitious appeal to the Ordeal, and cursed Morfel. This equality of power became at length productive of anarchy, from the degenerate state of men's minds, and obliged the virtuous and the weak to look forward to some situation in which they might expect to find relief from the oppressions of the strong and vicious.

IN contemplating these misfortunes, and perceiving that by mutual assistance alone

* Charlev. N. Fr. 3. 326.

they

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they might ensure a state of happiness, they fixed their thoughts on a union of persons, who might, by their combined force, be able to prescribe rules, and carry them into execution, for the preservation of the innocent and the punishment of the guilty.

SOCIETY was thus produced, and the members thereof gave up each his respective right of judging for himself, into the hands of the community.

IT is evident that as liberty is far the dearest natural right of man, none would give up so inestimable a blessing without a hope of obtaining thereby an equivalent benefit. It is therefore necessary to find out what benefit has been received in exchange for our *natural liberty*^f. This will appear, by considering that, in a state of nature, each individual hath the same right of jurisdiction, and consequently every one hath the same power to punish; whereas, in a community formed by mutual consent, the right of punishing is vested in the body at large, and the delinquent has a certain and impartial judgment. The lives, liberties, and estates of men, which may emphatically bear the name of

^f See note (a) in chap. i. book i.

property,

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property, are preserved to the weak and virtuous, and thereby the primary laws are protected in their fall. Thus the ferocity of nature gave way to the more perfect system of political liberty, and each individual pursued his avocations with content, under the assurance that the legislature chosen by the society, of which he became a member, would protect him.

IN pursuance of the order laid down, we are now led to consider, 2d, That no legislative power, but such as is chosen by the people, can *lawfully* make laws to bind them.

A SOCIETY thus formed, obtained an indisputable right of making laws conformable to those of nature, and of enforcing their execution when made. To them, every member of that society is obliged to submit, under a commination of the punishments annexed to his offence, because he voluntarily acquiesced under such restraint. The obligation is indeed a restriction of his natural liberty which he surrendered as a price for the protection of the community.

IF the community acquire this right of legislation over its members by its formation,

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tion, it cannot be doubted but they are at liberty to delegate that power to one, or to a number of individuals most likely to answer the end for which they were themselves appointed ; and under whatever form the government is established, there alone the right belongs of making and enforcing obedience to such laws, as they have enacted and promulgated ; and it is highly criminal to oppose them, since such opposition would be reverting to a state of nature, and assuming the right of judging for ourselves, which would be erecting but to destroy.

LEGISLATORS chosen by the consent of the people, whose principles, conduct and abilities, have been scrutinized, are more likely to decide for the preservation of the people than any single individual prejudiced in his own cause.

THE legislature thus chosen becomes invested with the supreme power of the state, and acts as the collective body ; and as the constituents in their formation, sought but the preservation of themselves, so the legislature intrusted with this power, cannot exceed these bounds ; for we were in a state of nature our own masters, until we consented
to

to society; and no man in his reason being free, would give an absolute right over that freedom, and his life, into the hands of another. Nay he could not give up his whole liberty, for then he would be subject to the arbitrary will of his superior, to act if he required against the law of nature, which being anterior to all society, and compulsive on man, cannot be totally given up. A man may dispose of what he possesses, but he cannot resign into the hands of another, what he never had.

IF then the legislature must be supreme, in order to enforce laws on the people, the second head is fully proved: and this leads also to a proof of the third head, "That laws made by any other power are invalid." This assertion is still farther maintained by these additional considerations.

SEEING that positive laws (or those made by the members of society, or persons chosen by them) derive their force from the authority which enacts them, and that no one or more of a community can have power to make laws without the consent of the whole, whoever in that state shall assume a legislative right, is guilty of violating the
harmony

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harmony and protection sought for by its members, and therefore becomes a just subject for the coercion of the whole body.

SOVEREIGNTY being only an acquired right, it is manifestly an usurpation of the power vested in the community at large, when any one or more of its members exercise any authority which has not been duly and formally delegated to them, by those in whom it is inherent. Such assumption of usurped power can be no longer peaceably enjoyed, than whilst the oppressed people are unable to resist. All unnatural, and therefore unconstitutional power, can be acquired only by violence or stratagem; yet, although force may compel, it can never insure obedience. Man naturally shuns a galling yoke; but when the burden is not qualified by his own choice, it becomes intolerable, and he will submit to its load no longer than he is unable to cast it off.

WHAT every man was before he united in society, such are different societies, none of which have a right to exercise a power over another, since none are amenable but to the society to which they are united. No individual, in a state of nature, had any
pre-eminence

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pre-eminence over his fellow creatures ; and for one society to assume a power over the people of another, would defeat the end for which it was instituted, (the preservation of every member's property) which would become totally insecure, if it depended on the caprice of a legislature, to the forming of which, no consent had been previously given.

It may sometimes happen that cruelty and injustice, may divert the arms of the unjust and merciless, to impose laws on a neighbouring society ; or, that a legislature, lawfully chosen, may exceed the trust delegated to them ; and in these cases it may be prudent for the injured to submit for a time ; but a brave or generous people will seize the earliest golden, glorious opportunity to render themselves justice. The English have forcible examples ; in the Americans in one case ; and in the calamities of the race of the Stuarts in the other.

HAPPY will be that nation which, yet untaught by precept, shall have a minister who by holding these examples up to view, may save her from disgrace and ruin. Who will

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will have candour to shew that *acquiescence* is not *submission*.—That the last resource of a brave oppressed people, is an appeal to heaven: and who will be bold enough to say to his misled country in the words of Zamti,—

—————Tho' ruffian pow'r
May for a while suppress all sacred order,
And trample on the rights of man;—the soul,
Which gave our legislation life and vigour,
Shall still subsist—above the tyrant's reach.—
—The spirit of the laws can never die.—

THE fourth head of this enquiry is “That, altho' Ireland is dependent on the *crown*, it is not of right, or in consequence, on its *parliament*; which can bind Ireland in no other manner than it does other nations, by prohibiting the importation of foreign goods into their country.”—

BEFORE the reign of Henry II. Ireland was unquestionably independent of England.—The kingdom was divided into several petty states and principalities, and the people were ruled by the *Brehon* law, (so called from their judges who were stiled Brehons).

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Brehons). This law was in many respects strongly analogous to the Jewish code, particularly in its punishments, which were founded on the *lex talionis*; and as Moses and the Jews received their learning from the Egyptians, it is probable the Brehon law had the same origin; particularly as it has been proved to a certainty, that Ireland was peopled from Phœnicia which joined Palestine ‡.

As the parliament of England hath claimed a jurisdiction over the kingdom of Ireland, a full investigation of its right to that authority, is a duty incumbent on every Irishman, more especially on those for whom this work is calculated, as the establishing or reprobating of that right will

‡ Major Vallancey, by comparing the Irish language with a dialogue in the comedy of Plautus, has shewn that it is the same with the pure antient Celtic, spoken by the Phœnicians; and the Irish music appears to have the same origin, the harp being the favourite instrument of the old Irish, as it was of the Jews, whose country joined Phœnicia.—Besides there are many circumstances which lead to this proof, as that *Senus* is the name by which the Romans knew a river in Ireland, and a city in Egypt.

make

make a wide difference in the laws of this country : If it be founded in justice, the Irish should obey without a murmur, because laws made by a legislature properly invested with the power, enforce an obligation.—But if it shall prove an usurped power, it may then become a question drawn from the preceding considerations, how far the Irish are warranted to oppose it, upon natural principles.

ENGLAND founds her title on the following historical events : Mc. Murrough, king of Leinster, having rendered himself hateful to his subjects, by repeated acts of tyranny and oppression, and having been defeated by the neighbouring princes, (like the wretched James II.) abdicated his throne, and fled to Henry II. of England, for protection.—Henry was then in France, and being unable to supply Mc. Murrough with the assistance required, he granted him letters patent, to raise forces in all his dominions.—Richard, earl of Pembroke and Chepstow, (commonly called Strongbow) became a volunteer in his service, on condition of getting his daughter Eva in marriage, and the kingdom of Leinster at his de-

xviii INTRODUCTION.

cease as a portion ; and Mc. Murrough, by the assistance of the English adventurers, performed his covenants with Strongbow.

THE third year of this invasion, king Henry, being previously armed with the bulls of two popes, landed at Waterford, and marched to Dublin, where he received fealty from the kings of the country and their clergy, who *adopted* the laws of England, and the ordinances of the English church, in full congregation.—

WHETHER this invasion of Henry II. hath annihilated the crown of Ireland, and reduced the kingdom to such a state of dependance, as to render it liable to be bound by the English parliament, is a subject which was agitated with great warmth, so early as the reign of Richard III. upon the question, “ Does the staple act bind “ Ireland ? ” and again in the Exchequer chamber, the first year of Henry the VII. and the judgment is reported as follows : “ Hufsey, the chief justice, said, that the “ statutes made in England, shall bind “ those of Ireland, which was *not much* “ *gain said*

“ *gainſaid* by the other judges ^h :” altho’ ſome of them were of a contrary opinion in the preceding term, ⁱ Huſſey being then abſent. At this time the judges held their places *durante bene placito*; and examples are not wanting to ſhew the courtly behaviour of the puiſne brethren of *that* bench, to their chief.

THE opinion of the judges in the reign of Richard III. was unanimous, that the authority of the parliament of England cannot affect the people of Ireland, within the realm thereof, *because they have not representatives in that parliament*. The people of Scotland were no leſs connected with the crown of England, from the union in the perſon of James I. than the Iriſh were; yet, even under that monarch, when the doctrine of paſſive obedience was univerſally ſupported by the favourites of the court, it was never urged that the Scots could be bound by the Engliſh parliament. The crown of Ireland is now, and hath been, as ſeparate and independent of the parliament of England, as the crown of Scot-

^h Year book, Mich. 1. Henry VII. fol. 3.

ⁱ Year book, Mich. 2. Rich. III. fol. 11.

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land was before the union of the kingdoms in the reign of queen Anne; all the recognition and claim that hath been laid to one, hath been made of the other, both by an English statute, 12 C. II. c. 2. and the 13th C. II. Sess. 1. c. 1. passed in Ireland, which enact, that to his sacred majesty, his heirs and successors, the imperial crown of the realms of England, Ireland and Scotland, with their dominions and appurtenances, do of right appertain; therefore the parliament hath either exerted an usurped power in the one case; or by their supineness in the other, robbed the English of an extensive country, which they, with great contention, obtained by *treaty* at a future period.

LET us compare the title upon which the English parliament build their claim, to bind two millions two hundred thousand people, contrary to their consent, with the principles before laid down:—a title on whose foundation the most ingenious architect could not build even a temporary edifice.

THE royal descent in Ireland was not regularly lineal; the prince was elected by
the

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the people from among the royal family, and the heir apparent was often excluded from the sovereign power; bodily strength and personal bravery, being always preferred to proximity of blood.—Mc. Murrough was raised to the throne, by the suffrages of the people, and held his sovereignty in trust for their service.—His surrender to Strongbow, was a breach of that confidence, which the people had reposed in him; it was an act arbitrary and unjust, and which no subsequent consent could render warrantable.

ALTHOUGH Henry II. accepted a surrender of part of the kingdom from Strongbow, and exerted regal authority, there is no principle of government by which he could be deemed a rightful legislator. Mr. Locke asserts, “ That the legislative power
 “ cannot transfer the power of making laws
 “ to any other hands; for it being but a de-
 “ legated power from the people, they who
 “ have it cannot pass it away to others :
 “ The people alone can appoint the form of
 “ the commonwealth, which is by consti-
 “ tuting the legislative, and appointing in
 “ whose hands that shall be *.”

* Government, ch. 12. sect. 141. book 2.

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IT has been urged that the fealty performed, and oaths taken by the Irish princes, were a sufficient surrender to give a legislative authority: But if Mr. Locke's principles are admitted, (and I trust they will not be refuted) such surrender was of no avail; it was but a mark of prudence, or of fear. Oaths of fealty were not considered as binding in the case of princes: The kings of England did homage to the kings of France, for their continental territories, and bound themselves in oaths of fealty, infinitely more humiliating both in ceremony and words, than those used by the Irish to Henry II. yet the histories of both countries are replete with instances of royal perfidy; of entering into wars against their sovereigns, and of treating citations to the French parliament with the utmost contempt. And the Irish princes were no more competent, to make a surrender of the crown of Ireland, to Henry II. than John was to deliver the crown of England to the pope.

SCARCELY was the usurpation removed by the departure of Henry, than those supposed tributary princes commenced hostilities against the English:—A small dawn of
light

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light has often proved sufficient to detect imposition.—

IF the advocates who contend that Ireland is a ceded country, will not be contented with such irrefragable doctrine, yet they will find it impossible to deduce any conclusion from whence to make Ireland dependent on the English *parliament*.

THE surrender of Strongbow was a grant to his sovereign, who was not rendered incompetent by the laws of that country, to accept or hold a property independent of the state.—Experience hath taught the English, that it is not incompatible with regal dignity.—

SOME writers alledge the adoption of the English laws, as a proof of universal submission; but this only argues a preference of the English code, and such preference will be admitted.—The Romans adopted several of the Grecian laws, in the formation of those of the *twelve tables*.—The Irish in like manner adopted the laws of England, and abolished the Brehon law.

LAW

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LAW is a science, and the Romans and the Irish improved their jurisprudence by these adoptions, as they might have improved any other science by a similar method; They accepted them from a conviction of their utility and superiority over their ancient code; but it may with as much propriety be advanced that the soil of Ireland, is the property of England, because the Irish have adopted the English mode of tillage; and that the farmers of England should dictate to, and bind Ireland by their rules of agriculture, as that the parliament of Ireland should be coerced or bound by the English parliament, because they have adopted the English constitution.

THAT Roman who had dared to maintain that Rome could have been bound by the laws of Greece, or who would have appealed from a Roman judgment, to a Grecian tribunal, as a dernier resort from having adopted their laws, would have been guilty of treason against the commonwealth; Shall we not judge the same of a similar offence committed by an Irishman?

HAVING thus demonstrated that neither the surrender of the Irish kings, nor the adoption

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adoption of the English laws, can give the British parliament any right to bind Ireland by any of its acts, let us now examine a third plea, sometimes asserted by those bold assassins of our national right, namely, that "Ireland being a conquered country, the conquerors have acquired a right to impose laws on it;" and this, on mature examination, will be found to be erroneous in fact and precedent.

As to precedent :

ABOUT the middle of the eleventh century, the Anglo-Saxons were invaded by William of Normandy. The blood of their most noble families was shed in vain contention on the plain of Hastings, to preserve their liberties from the bold invader. The Norman language and customs were adopted in the English courts of law. The lands of the natives were surrendered into William's hands, and by him returned, manacled with the most oppressive fetters. The new sovereign stiled himself king and bastard, thereby overturning all regard for dignity : he proceeded to harrafs his new subjects ; for them was rung the dreadful and humiliating curfew :

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curfew : nay, after seven centuries are elapsed from that fatal period, the British sovereign uses the language of the Norman invader, to convey his assent to the statute laws. If these are not criterions of conquest, what are ? What is the derivation of the word conquest ? Sir William Blackstone very fairly proves¹ that word implies, he who, by any means of acquisition, becomes possessed of a property not his own before ; and says, in that light only, we must style William I. a conqueror.

LET us compare this disavowed conquest of England, with the pretended conquest of Ireland ; and the contrariety will strike every impartial person. In the one case, all those criterions we have just now considered ; in the other, a peaceable surrender of a few timid (or may be prudent) princes and ecclesiastics, whose golden rule is obedience.

THE English plume themselves upon the honor of being the last nation which fell under the power of the Roman eagle. The Irish claim no such titular honor ; they are

¹ Black. Com. Vol. ii. p. 48. 242.

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satisfied with having not fallen under her power, or the power of any other country.

It is true, the Irish did oppose the first adventurers who embarked in Mc. Murrough's cause; and they revolted against the fealty which was sworn to Henry. If success against such hostilities deserves the name of conquest, why are the people of Scotland allowed their representatives at this day? Why are their courts of justice distinct from those of their conquerors? They received no such conditions from the victorious arms of Cumberland.

If from a minute inquiry into the right of conquest between these two states, it became a necessary consequence that an opinion must be given, it might be asserted, and combated with a just claim to common sense, that England was *the* conquered country. It was certainly an acquisition to the king of Ireland (in the person of John) and, as such, it comes within the definition of Sir William; and, if an impartial reader will carry his idea to a very possible circumstance, this reasoning will not appear so wild.

LET

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LET it be supposed that Henry V. had concluded, as he began, the conquest of France; and that then (from a partiality to his native country, and a knowledge that the constitution of the two kingdoms were so inimical, that it would require superior abilities to direct both governments) he should have placed his son upon the English, and his brother upon the French throne, and that, upon the death of Henry VI. without issue, the crown of England should devolve upon the king of France; can it be imagined, that in such a case the seat of empire would have been at Paris; and England held as a secondary kingdom? Yet the genius of the people would have preserved them from dependance. The inferiority of Ireland, from those principles, depended on the adventitious circumstance of its not being as extensive a country as France. However the novelty of such a doctrine may warrant the smiles of the multitude, yet let it be remembered, that the most sacred and important *truths*, remain to this day contested by many nations.

BUT

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BUT the cause stands independent of such assistance. The submission to Henry II. was by no means similar to the (if you please) acquisition of William I. for we have seen that Henry II. received a surrender from Strongbow of part of the territories which he received as a portion by his wife; and that neither the recognition of Mc. Murrogh, the surrender of Strongbow, nor the acceptance of the English monarch, had the most remote claim to the fundamental principle requisite for the appointment of a legislator. The consent of the people was not received. We do not read that Strongbow or Henry were elected to fill Mc. Murrogh's throne.

It may be answered, that the oaths of fealty taken by the princes and the clergy; and the letters patent delivered to him by them, resigning him the kingdom, and acknowledging him for their king^m, are sufficient proofs of the consent of the people; but it has been already shewn that legislators cannot resign a power delegated to them by the

^m Mentioned by Roger Hovendon, annal. pars poster. f. 301 : and by John Brompton, Historia Journalensi, p. 1070.

community.

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community. However, it may be admitted, and the obedience in future time indulges it, that Henry II. was the lawful sovereign; but if we even suppose him the conqueror he stiled himself, the partizans for that opinion will not gain much advantage.

THE power obtained by conquest adds little to the prerogative of the conqueror. In a state of nature, it was a right unalienable, that every man should be preserved in his life, liberty and property. It was a trust committed by the laws of nature to all mankind. It was coeval with our existence; and Mr. Locke observes, "That no human sanction can be good or valid against it."

If a man hath no corporal power over himself to destroy himself, nor to take away the life, liberty, or property of another; any name he may assume, or any power he may obtain, cannot convey that right. "Right" being, according to a learned ethic writer, "nothing else but that which reason approves." And he goes on; "It is this

* On Government, c. 11. sect. 135. ° Burlemaqui, c. 9. sect. 4.

" approbation

"approbation only which reason gives to
"him who commands, that is capable of
"founding his right;" and reason will
hardly direct an infringement of the laws of
God.

A CONQUEROR is therefore bound to observe the laws of nature in regard to the people whom he hath subjected: He is to protect and not to enslave. He may overturn one form of government; the people alone can establish another.

WHERE the conqueror has a just claim to contend for the disputed sovereignty, it is reasonable and allowable that the persons who put themselves in a state of war against him, shall forfeit their lives or their freedom. This is applicable to the law of nature, against such as attempt to encroach on another's property; and the persons asserting their right, should be also allowed to take from the aggressors so much as will defray the expences they have incurred; if more is demanded, he violates the end for which society was formed. He benefits himself, and infringes the rights of the subject.

He

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HE can have no claim over the descendants of those he subdued : They consented not to the war.—They did not oppose the conqueror's right, by which alone his claim exists : He cannot demand it as a punishment of their ancestor, from whom alone a reparation can be exacted. We cannot dispose of what is not our right, and it has been already proved, that we have no right over others to destroy, but to preserve. Upon the same principle, the properties of such descendants are secure.—The president Montesquieu says, *On punit a la Chine, les peres pour les fautes de leurs enfans : ceci est encore tiré des idées despotiques*^p. The constitution of these countries may account for such tyranny. It is true, that in some cases by the laws of England, the children are punished by the forfeiture of their fathers' estates ; but there is a well drawn picture of such a scene, in the writings of a celebrated foreigner^q, who appears to be a compleat master of the relief, that humanity should give to punishment.

^p Tom. 6. c. 19.

^q Marquis Beccaria, p. 69.

NEITHER

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NEITHER can a conqueror have power over those, to whose assistance he owes his victory.—That would be complicated wretchedness: To run the hazard of present death; or, the sad alternative of future slavery.

HERE we have supposed a rightful conqueror.—It is obvious that no right can be obtained by him, who unjustly attempts to infringe upon property: The villain who uses irresistible force to deprive a man of life, freedom, or estate, can gain no property thereby, and he subjects his life as a sacrifice to his temerity.

FROM hence it follows, that a rightful conqueror can claim no power, except absolutely over the lives or freedom of those who oppose him; and conditionally over their properties, to reimburse him for his expences.

WHENEVER a compact is entered into between the conqueror and the captive, and an agreement is made for a limited power on the one side, and obedience on the

VOL. I. c other,

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other, Mr. Locke says ^r, “ The state of slavery ceases as long as the compact endures.” Henry II. gave up all absolute right by law;—accepted the oath of fealty ^s; and entered into an agreement with the people of Ireland.—*Rex Henricus antequam ex Hibernia rediret, apud Lismore concilium congregavit, ubi leges Angliæ sunt ab omnibus gratanter receptæ, et juratoria cautione præstita confirmatæ* ^t. He also allowed them the right of holding parliaments independent of England ^u.—Thence it appears pretty evident, that no notions repugnant to the idea of liberty, can be adduced from the pretended conquest under Henry II.

FROM that period there remain repeated proofs of the independent situation of Ireland, nor can any instance be produced, *until of late years*, where the parliament of England, *expressly* claimed a right of binding them.

IN order to prove the last head proposed, it will be sufficient to cite a few acts,

^r On government, c. 4. sect. 24. ^s Geraldus Camb. Hib. expug. lib. c. 1. ^t M. Paris, ad An. 1172, vit. H. II.

^u 4 Inst. c. 1. and 76.

whereby

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whereby the conformity of the jurisprudence between the two kingdoms, arose from laws enacted by the parliament of Ireland, and not from the power of the English legislature.

IN the year 1177, Henry called a parliament at Oxford, at which he created his younger son John, king of Ireland. Here then we may observe, that the Irish had a king and a parliament, totally separate from and unconnected with England; and had it not been for the failure of issue, of his elder brother Richard, who succeeded his father to the English crown, by which John became heir to that kingdom, at his brother's death, we must either have had a revolution in the government, or the crowns would have been separate at this day; for the law of hereditary descent prevailed in England, and had been adopted under Henry II. in Ireland, whereby the issue of John, would have been totally excluded from the English throne, as the descendants of Richard would have been from the Irish.

DURING the life of his father and brother, John exerted many acts of sovereign
c 2 power,

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power, and enjoyed all “ prerogative to the
“ estate and majesty of a king imperial ap-
“ pertaining, and be named, reputed and
“ taken to the kings of the lands of Ire-
“ land w,” &c. by granting charters to his
subjects, by one of which, the city of Dublin
enjoys many privileges.

THERE are also acts of Henry II. after
his resignation of Ireland to John, wherein
he does not use the title of *Dominus Hiber-*
niæ, which he used before the surrender.

UPON the accession of John to the throne
of England, the sovereign power of both
kingdoms vested in him, in the same man-
ner that Scotland and England were united
in the person of king James I.—How far the
same person exerted separate sovereignty and
distinct legislation, in the two kingdoms,
from that æra to the present, will appear in
the sequel.

IN the year 1210, eleven years after his
accession to the English throne, John came
to Ireland, and *fecit quoque ut ibidem con-*
struere leges et consuetudines Anglicanas ponens

^w Irish Stat. 33 H. 8. sect. 1. c. 1. sect. 1.

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vicecomites aliosque ministros, qui populum regni illius juxta leges Anglicanas judicarent ^x.

JOHN was succeeded by his son Henry III. who in the year 1216, granted to Ireland a Magna Charta, ^y by the advice of his privy council of England, and a free grant of all the liberties of England, to the people of Ireland.—*Volumus, quod in signum fidelitatis vestræ, tam præclaræ, tam insignis libertatibus, regno nostro Angliæ, a patre nostro et nobis concessis, de gratia nostra, et dono in regno nostro Hiberniæ gaudeatis vos et vestri hæredes in perpetuum. Quas distincte in scriptum reductas, de communi consilio omnium fidelium nostrorum, vobis mittimus signatis sigillis* ^z, &c.

IN the year 1228, he granted them the privileges contained in the great charter of John his father ^a.

By these charters, it is obvious that the kingdom of Ireland obtained the right of holding parliaments of its own, (which right it had eleven years, anterior to the com-

^x M. Paris, p. 220.
book of the Exchequer, Dublin.

^y It is to be seen in the red
^z Pryn. ast.

^a Inst. c. 76. p. 250.

^a Ibid. 252.

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mons of England ^b) and of being governed by the common and statute law then enacted.—It would be contrary to reason and good sense, to form an opinion that grants made with such solemnity and expressions of regard, could convey a secret reservation not even hinted, that the superiority of England was implied.—The legislature of both kingdoms remained in that persuasion for more than four hundred years.—A parliament of this kingdom, touched at this day with nothing more pernicious than the memory of their ancestors, might remain of the same opinion.

IN the thirteenth year of Edward II. the parliament of Ireland confirmed some statutes made in England, and referred others to the consideration of the next parliament; and 10th of Edward IV. enacts, that “the statutes made in England, shall not be of force in Ireland, unless allowed and published in parliament here;” the 29th of Henry VI. enacts to the same purpose. These are not upon our statute books; but Sir Richard Bolton says in his

^b See Petyt, keeper of the records in the tower, on that subject, p. 71.

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notes, he saw the exemplification of them, in the treasury of Waterford^c.

By the Irish statute, 18th Henry VI. c. 1. "No purveyor, &c. shall be within the land of Ireland, and all statutes made in England, in regard thereto, are directed to be of force." By the Irish statute, 8 Edward IV. c. 1. "All statutes made in England, are adjudged by the authority of *their* parliaments, to be in full force and strength." By 10 Henry VII. c. 22. "All statutes late^d made, within the realm of England, concerning the public weal of the same, shall be accepted and executed within the kingdom of Ireland."

By the English statute, 8 of Henry VII. c. 20. sect. 1. it is enacted, that all alienations, &c. by any woman having lands, &c. in jointure or in dower, of the inheritance or purchase of her husband, shall be void; which was not of force in Ire-

^c See a marginal note to Sir Richard Bolton's edition of Irish Stat. to Stat. 10th Henry VII. c. 22.

^d 4 Inst. c. 76. p. 351. meaning all statutes made before that time.

land,

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land, until enacted there by 10 C. I.—
sess. 2. c. 8. sect. 2.

By the general confirmations above-mentioned, and by the particular confirmations referred to in the following work, (of which the last recited statute is an example) it appears that all the force the several English statutes received in Ireland, proceeded from the authority of the Irish parliament.

It is however asserted, that by the language of some Irish statutes, anterior to the last general confirmation, under Henry VII. and by some subsequent statutes made in England, which affect Ireland, altho' they have not received the sanction of that parliament, the Irish knew it long ago to be a question doubted, whether the English might not bind them, and they have also submitted to the co-ercion of their laws.

WHEN it can be proved that perception is consent, and that removing a doubt, is the criterion of subjection; then, and then only, can any impartial man adopt that opinion: Besides we have a most conclusive proof, that the doubt has been most amply resolved.

resolved. The Irish statute, 8 of Edward IV. c. 1. recites a doubt, whether the 6 Richard II. c. 6. concerning rape, ought to be of force in Ireland, unless confirmed there, as a small alteration had been made by that act to statute 1 West. 2. (which had been confirmed by 13 of Edward II.) and enacts that the said statute, and all others (as above quoted) made in England, shall be in force in Ireland, from the then last 6th of March.

HAVING thus sufficiently obviated the first part of the assertion, let us farther see what validity an English act not confirmed by the Irish parliament, was esteemed to have.

By the English statute, 24 Henry VIII. c. 12. sect. 5, 6. revived by 1 Eliz. c. 1. it is enacted, that in case any of the king's subjects, have need to pursue and appeal to Rome, &c. they may have their appeals within the realm, &c. And so to all other archbishops in other the king's dominions; yet, notwithstanding the general tenor of this act, it was thought expedient to pass a law in Ireland to that effect, 28 Henry VIII. c. 6. sect. 1.

By

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By 21 Henry VIII. c. 13. The manner and power of the archbishop of Canterbury to grant dispensations, is directed to extend not only to the realm of England, but to all the king's dominions; however, its force depends on an Irish statute, 28 Henry VIII. c. 19. sect. 1. revived by 2 Eliz. c. 1. with special provision that it shall not be prejudicial to any archbishop, &c. of this land. Here is a special act, wherein Ireland might be naturally supposed to be in contemplation, confirmed and altered, and that too under the reigns of two monarchs, as jealous of their prerogative as any the annals of English history can produce.

THE 26 of Henry VIII. c. 8. sect. 1. of first fruits, includes by express words, "all his majesty's dominions," but has its effects in Ireland, by 28 Henry VIII. c. 8. sect. 1. passed here.

By 32 Henry VIII. c. 9. maintenance, &c. is prohibited under the penalty therein expressed, and it is thereby enacted to be executed in Ireland. It would be totally unnecessary, and beyond the design of this Introduction, to enquire whether any prosecutions were
carried

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carried on in this kingdom, for offences contrary to that statute. If there were not any, the statute did never operate ; if there were any, the spirit of the nation was touched by the injustice, for it was confirmed by an Irish statute, 10 Charles I. *ses.* 3. *c.* 15, *sect.* 1.

By an Irish Statute, the 33d Henry VIII. *ses.* 1. *c.* 1. *sect.* 1. the king, his heirs and successors, shall be kings of Ireland, with all the prerogatives to the estate, and majesty of a king appertaining ; and by an English statute, 1 Mary, *stat.* 3. *c.* 1. *sect.* 3. * the kingly office is extended to either male or female. The chief authority appertaining to the crown, is to have the whole executive and one branch of the legislative power vested in it : If the parliament of England assumes a concurrent power with the king to interfere in the branch of the legislative, which belongs to him ; his prerogative is diminished and divided into many hands. This would be to overturn the constitution, as insured to us by the charters above-mentioned, and to rob us of the privileges to which, as well by these charters as by natural right, we are intitled.

* This act hath its force in Ireland, without the sanction of an Irish law ; but that will be accounted for hereafter.

THESE

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THESE statutes are evident proofs that it was necessary to confirm all acts made in England, however universal the words, by the parliament of Ireland, where that kingdom was to be affected.

WHILST both spirit and letter of the above-cited Irish statutes, militate against the binding power of the British legislature over Ireland, it must not be denied but there exist also some acts where Ireland is particularly mentioned; and where it might be thought, at first sight, they were enacted with an intent to bind her; but if we examine them closely, we may find some reasons to wave that opinion.

THE first; *Statutum Hiberniæ*, 14 Henry III. was nothing more than the king's answer to a question proposed by the then Lord Justice, respecting a point of law; and so it appears in the collection of the English statutes; for, contrary to the mode in acts of parliament, it is signed, "*teste me- ipso apud Westm. 9 Feb. anno regni 14.*"

THE next, wherein Ireland is named, is called, *Ordinatio pro Statu Hiberniæ*, 17th Edward

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Edward I. It forbids any officer of the crown to purchase lands in that kingdom. The continual violation of this ordinance, renders any farther inquiry into its force unnecessary : any authority it could have at this day would depend upon the confirmation, stat. 8th of Edw. IV.

UPON the staple Act, 2 Henry VI. c. 4. wherein Ireland is particularly mentioned, two questions arose in the Exchequer chamber, whether this act bound Ireland, and it is thus reported : “ *Et ibi quoad primam questionem dicebant, quod Ter. Hibern. inter se habent Parliament. et omni modi Cur. prout in Angl. et per idem parliament. faciunt leges, et mutant leges, et non obligantur per statuta in Anglia, quia non hic habent milites parliamenti: sed hoc intelligitur de terris, et rebus in terris illis tantum efficiendo; sed personæ eorum sunt subiect. regis. et tanquam subiecti erunt obligati ad aliquam rem extra Terram illam faciend. contra statut. sicut habitantes in Caleſia, Gascoignie, Guien, &c. dum fuere subiecti, et obedientes erunt sub admiral Angliæ de re fact. super altum mare; et similit. brev. de errore de judicio reddit. in Hibern. in banco regis* ”

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"*gis hic in Angl.*" These questions were again argued before Lord Chief Justice Hufsey, and his opinion is reported as before-mentioned.

THE English statute, 27 Henry VIII. c. 20. sect. 1. concerning tithes, is express in regard to Ireland. This act respects the ecclesiastical law, and we know that at that æra, when the people of England were shaking off the pope's supremacy, it was highly necessary to indulge the clergy, by giving them every security that their fancy could suggest, or policy intimate, else the pulpits might have resounded with declamations against the reformation: Besides, it was but a temporary act, only to take effect until the king, and such persons as he should appoint, did make the ecclesiastical law of the church of England; and accordingly we find that by an Irish statute, 33 Henry VIII. ses. 1. c. 12. sect. 1. the payment of tythes is secured according to this temporary law.

By the English statute, (before mentioned) 1 Mary, stat. 3. c. 1. sect. 3. the crown

^f Year book, Mich. 2 Richard III. fol. 12.

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of this kingdom, with all the prerogatives, &c. appertaining thereto, shall vest in male or female. This, as well as all other statutes declaratory of the common law of England, have force in Ireland by virtue of the adoption of that law. By the charters granted by Henry II. John and Henry III. and by a rule of descent that the female shall inherit, on failure of male issue, it is true they are all to succeed to equal portions ; but the necessity of having the throne filled by a single person, obliges the law of descent to be innovated upon in this particular.

THE English statutes, 3 James I. c. 1. sect. 2. and 12 Charles II. c. 30. sect. 1. direct the holidays therein mentioned to be kept as fasts in England, Ireland, &c. but they are confirmed in the Irish parliament, by 7 William III. c. 14. sect. 1.

By the 18th Charles II. c. 2. and 20 Charles II. c. 7. (made perpetual by 32 Charles II. c. 2.) no cattle shall be exported from Ireland into England, Wales, or Berwick upon Tweed, on pain of forfeiture of the ship, &c. This law cannot bind Ireland ; for every nation hath a right to prohibit

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bit the importation of such commodities as it chuses. The preservation of itself may sometimes require it; and that was the purpose for which society was formed. If we consider the large tracts of uncultivated and depopulated countries in the western and southern parts of Ireland, wholly taken up in grazing for foreign markets, whilst thousands of our countrymen are obliged to come to England for employment in husbandry; and whilst our quays are crowded with vessels from England and Wales, with corn and potatoes for the Irish market, I think it might easily be proved, that the people of Ireland would not be losers by such an act: But this is a subject foreign to the purpose, and must be left to a work more exactly calculated for it, and to a writer more competent to the task. To return.

By 1 William and Mary, c. 2. every person that shall profess the popish religion, &c. shall be incapable to enjoy the crown of England or Ireland. Here we are specially named. By 12 William III. c. 2. the crown of England was settled on the princess Sophia and her heirs, being Protestants,
after

after the decease of his Majesty, &c. But when we observe that the parliament of England hath a right to alter the succession of the crown; and that by 33 Henry VIII. fef. 1. c. 1. sect. 1. the Irish enacted, “that the crown of Ireland should be ever united and knit to that of England,” this will appear no encroachment on our liberty, and besides, this succession was confirmed by an Irish statute, 2 Anne, c. 5. sect. 1.

By 1 William and Mary, stat. 2. c. 2. sect. 1. a declaration was made of all the rights and liberties of the people of England; and by the 12 and 13 William III. these rights were again recognized and secured. These acts were only declaratory of the common law, and as such alone have force in Ireland; this is evident, for there were new clauses inserted, that changed the common law. By one, the judges were appointed *quam diu se bene gesserint*, but as that clause was not confirmed by the Irish parliament, the judges of Ireland hold their places (to the disgrace of independence, although their justice is rigid) *durante bene placito*. Even the government of England did not conceive it otherwise, for when a

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bill was introduced into this kingdom a few years since, to render them equally independent, it was rejected there.

By English statute, 1 William and Mary, c. 9. all acts made in the pretended parliament of Ireland, under king James II. are declared void.—This would have been a direful precedent of our dependance, it would in fact annihilate our legislature, for without supremacy it cannot exist, as it is well observed by Sir William Blackstone, that “the parliament is the highest and “greatest court, over which none other can “have jurisdiction^g.”

THAT country would be wretched indeed, which is subject to two masters^h, the one having power to command; the other to prevent; this would be a solecism; such misfortune could never have happened at a period, when the people were zealously contending for liberties, equally the birth-right of every subject, under a prince who was ever foremost in promoting the happiness and security of all around him, and

^g Vol. i. p. 161.

^h St. Matt. c. 6. v. 24.

who

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who declared that he came to assert the rights and liberties of these nations. Mr. Locke is of opinion, "that nobody can de-
 "fire an absolute power unless it be to com-
 "pel by force, to do that which is against
 "the right of freedom¹." This was not the king's intention, as it would be destructive of the rights to which the people laid a claim, and the prince had consented: It was found therefore necessary to abrogate those acts of James, by an Irish statute passed the 7 of William, six years subsequent to the English act.

A VERY apposite case may be put, that will render the necessity of a confirmation of the statute more apparent. Suppose that after the English statute of 1 William and Mary, had passed to repeal king James's acts, a bill of indictment had been preferred for an offence committed against any of these acts: How would an honest grand jury, mindful of their oaths, have acted? They would certainly have found the bill, as they could not have thought the English act a sufficient abrogation of laws, passed in

¹ C. 3. sect. 17. on government.

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the Irish parliament.—This we may conclude from the conduct of a jury, to which a bill of indictment was preferred, (for forging a member of parliament's name to a letter) and *ignored*; because, tho' it was an offence by the British law, there was no provision against it by any Irish statute.

By the English statute, 3 & 4 William and Mary, c. 2. the Irish act, 1 Eliz. c. 1. which appointed the oath of supremacy is repealed, and a new oath and declaration against transubstantiation appointed. This statute doth most effectually shew at first view, a design in the English legislature, to exert an authority over Ireland, and the Irish acquiesced in it; but that was at a time, when a dangerous rebellion was carrying on against the protestants, and when the native Irish, unacquainted with the maxims or policy of the constitution, conceived that death alone could tear their sovereign from them. The infatuated bigotry of the times, rendered it impossible to strike at the root of the disorder in Ireland, where the multitude was blinded by enthusiasm, and it became highly necessary, to seek for assistance from our sister country: Nothing
else

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self was left to preserve us; and England herself has been obliged to exceed her constitution, to preserve her state. But altho' this act passed in England, it may be justly said that it was with the consent of the Irish; for a great and respectable number of Irish protestants, who had been driven to England, made serious application to the English parliament, for the obtaining of the laws that were then made for their protection: Nay, that it might seem as a work of necessity only, as soon as the religious feuds were abated, and the constitution had regained its strength, the very oaths and declaration prescribed by this act, were legalized in due form by the Irish statute of the 2 of Anne, c. 6.

HISTORY fully demonstrates the danger of religious disputes being suffered to interfere with the management of state: Mistaken zeal is ever the ground of persecution; the writ *de hæretico comburendo*, that disgrace to our laws, flourished with equal force under some protestant as well as popish monarchs, and its suppression was the triumph of reason over bigotry. Whilst superstition reigns, human foresight is but a weak barrier

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rier against persecution; for if men are persuaded, that the attainment of immortal glory can be so cheaply purchased, as by the destruction of a few helpless heretics, the terror of earthly punishment will rather stimulate the rage. The cultivation of a spirit of liberal enquiry, is the sole weapon to combat such horrid infatuation, and toleration affords the best means to effect this purpose. Mr. De Voltaire observes, “ that
“ in all countries where liberty of consci-
“ ence is allowed, the established religion
“ will absorb all others ^k.”

THIS principle hath long since made its way into France, Holland, and other countries, and seems in this country to be reserved for our day, that we may behold and rejoice in the glorious effects of christian charity, over the unchristian doctrine of persecution, which is a stain to humanity.

IT is absolutely necessary and reasonable, that in our temporal concerns, there shall be a criterion of right and wrong, and that we shall dispute on that question, because

^k Letter IV. of Quakers.

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we have a judge to determine: But an argument that cannot produce decision, is extravagant folly: and such is the case in polemic disputes. Is it not enough that every man pursues his own method in religious concerns, (since the greatest divines have differed in their opinions) and that he leaves the determination to that infallible judge, who alone can render justice? Toleration, which infuses free enquiry, carries on its wings the air of truth, and seems to bid defiance to detection.

By English statute, 1 Anne, statute 1. c. 22. "All persons educated in, or professing the popish religion, and who being under the age of eighteen years, shall omit taking the oaths prescribed within six months after they attain that age, shall be rendered incapable of taking by descent, &c. any of the forfeited estates in Ireland." This act only affects the disposition of such property as was forfeited by rebellion, and as it was carried on against a lawful sovereign, who has (as we have seen before) a right to the lands of the conquered, to reimburse himself and his followers, for the loss they may have sustained;—
that

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that right would be very trifling, if he had not a power to dispose of the lands; and as the members of the Irish parliament were mostly connected by blood or marriage with their unfortunate countrymen, it might have proved difficult at that time, to have obtained a disposition by that legislature, even tho' it should be necessary: The fortunes of soldiers are desperate, and will not brook delay.

THESE are all the statutes affecting Ireland, which passed in England, until the sixth of George I. for which causes tolerably rational can be assigned.

THERE yet remain to be mentioned, some which are more strong in their operation over this country: These indeed cannot be well reconciled to justice, but it is to be remembered that they are those of which the Irish complain, as infringements of their rights.

BY 15 Charles II. c. 7. “ No commodity of the production of Europe shall
“ be imported into any of the English plantations in Asia, Africa, or America, but
“ such

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“such as shall be shipped in England,
 “Wales, or Berwick,” except linens from
 Ireland, by 3 Anne, c. 8. By 22 and 23
 Charles II. c. 26. and 7 and 8 William III.
 c. 22. “No goods shall be imported or
 “exported into any of the said plantations,
 “in any but English or Irish ships, and
 “whereof the master and three-fourths of
 “the mariners are Englishmen, (which by
 “13 and 14 Charles II. c. 11. is explained
 “to mean English, Irish, or plantation sub-
 “jects) and all such commodities as are the
 “produce of the plantations, shall be first
 “brought into and unloaded in some port
 “of England, Wales, or Berwick, on pain
 “of forfeiture of the ship and cargo.” By
 7 and 8 William III. c. 3. and 1 Anne, sta-
 tute 2. c. 8. Any sort of hemp, flax, and
 the productions thereof, may be imported
 into England, free from all duties, on the
 conditions therein mentioned. By 5 George
 I. c. 18. “All salt exported from Ireland
 “into Great-Britain shall be forfeited, un-
 “less the master of the ship shall pay or se-
 “cure the duty, within ten days after its
 “arrival.”

THESE acts impose a restriction on the
 Irish merchant trading to these countries,
but

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but however detrimental the conditions may be to the Irish trade, (and certainly they are very great obstructions to it), they cannot be considered as *binding* statutes: He is not compelled to trade with these countries. Every man has a right to qualify the conditions upon which he will receive his guest; the person invited may avoid the terms, by not accepting the invitation.

It will be said that this is theoretic doctrine, in as much as the Irish are constrained by these acts, not to trade there, but on those conditions, and by those (which shall be observed hereafter) they are excluded from most all other commerce. This is indeed a melancholy truth of which the Irish have long complained. With a laudable spirit of moderation they have repeatedly sought redress from England.—They have supplicated for their right, and came away unsatisfied.—They know they are oppressed, but their patience is not tired; may it still continue! and give the parliament of Great-Britain an opportunity of extending that freedom, for which they have ever contended themselves, without being roused to an ill-judged fit of desperation, and risque
the

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the general ruin of their constitution and themselves.—The disorder should exceed all hope before so violent a remedy is applied.—The re-listed arm seldom gains the strength it had, before the blow was struck.

IN the present moment the prospect is but gloomy ; the narrow and illiberal policy of the English commons, hath infatuated them with the groundless opinion, that to extend the Irish trade, would prejudice that of Great-Britain. Yet the Irish are not without hope ; a *whiter* hour may come, when their *loyalty*, their *services* and *patient demeanor*, will plead for their being restored to the rights of free-born subjects, and be heard at the bar of justice.

OF their unshaken *loyalty* to the house of Hanover, recent proofs have been given : When in the two last rebellions, the misled sons of Scotland descended from the mountains, and thickened the ranks of a pretender to the British throne, what Irishman joined them ? When the town of Manchester (that nurse of disaffection, for whose separate interests those of Ireland are negatived) raised troops

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troops against their rightful sovereign, the Irish were armed only for his defence.

THE *services* Ireland have done to Britain, have continued from the earliest period. Tacitus says, *idque adversus Britannium profecturum, si Romana ubique arma et veluti conspectu libertas tolleretur* *. And their peaceable and *patient demeanor*, under accumulated oppressions has been, and still continues, to be glaringly conspicuous.--- Surely, at length, these considerations will cause the interposition of their gracious sovereign.---A future, more liberal and more enlightened English parliament, will reflect on what the conduct of Ireland hath deserved. The English will be sensible of her utility to them, and they will wisely fear, lest the common enemy, taking advantage of the many mal-contents who are the offspring of oppression, may offer an assistance, which in the moment of frenzy may be accepted. From these causes all uniting, we may hope that the day of our relief is not far distant.

* Vide vit. Agricol.

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IN the contemplation of such favourable expectations, and adverting to the known loyalty of this kingdom, it cannot be seriously apprehended by any impartial man, that the Irish entertain a thought of availing themselves of the present distressed situation of their sister country, and of shaking off that yoke with which they have been so long galled.—Every nerve is extended to shew their unshaken fidelity.—The whole kingdom is a camp to baffle the perfidious attacks of her enemies—and they appear to have an ambition to reserve the glorious act of diffusing liberty, for that country by whom they have been so long oppressed.—Exquisite delicacy! To spare the dying groans of a bleeding nation, by suffering her to make atonement for her crimes.

THERE yet remain to be considered, a few statutes which positively restrict Ireland in the most effectual manner, and against which there is nothing can be offered, but to submit to the public, whether a series of declared independance for upwards of four hundred years, shall be overturned by a few restrictive laws, which owe their precedent to a reign, in which interest and dissipation prevailed

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prevailed over all regard to faith, truth, and honour? And whether they are not contrary to the principles for which society was founded—to the privileges granted us by our first kings of the Norman race; and to the existence of the Irish legislature, which to be perfect requires to be supreme. Sir William Blackstone says, “however they” (governments) “began, or by what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontroul-
ed authority, in which the *jura summi imperii*, or rights of sovereignty reside °.”

By 12 Charles II. c. 28. no commodities of the productions of the countries therein mentioned, shall be imported into England or Ireland, in any but English or Irish ships, and of which the master and three-fourths of the mariners are English, (*i. e.*) English, Irish, or plantation subjects). By 12 Charles II. c. 32. and 10 William III. c. 10. “No
“ persons shall export out of Ireland any
“ sheep, wool, woolfels, mortlings or shor-
“ lings, yarn, or packs of wool, wool flocks,
“ fullers-earth, or fulling clay, except to the

° Vol. 1. p. 48.

“ dominions

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“dominions of England, &c.” By 13 Charles II. c. 18. and 5 George I. c. 11. “No person shall press or pack up in sacks, chests, &c. or lay near any navigable river, any wool, &c. with intent to export the same into foreign parts.” By 5 George I. c. 11. “No wrought silks, bengals, stuffs mixed with silk and herba, and muslins and other callicoes, the manufacture of Persia, China, or the East Indies, shall be imported from any place, other than Great-Britain into Ireland,” and by 9 Anne, c. 12. “No person shall import into Ireland, from Flanders or other parts, except Great-Britain, any hops; under the penalties of the respective acts.”

THE violence of these laws, which have nothing but the *power* of Great-Britain to support them, will appear extravagant when we consider that, as Ireland hath a parliament distinct from England, confirmed by the most solemn deeds, there can be no subordination.

NATURE has marked out both countries as seats for liberty:—As independant sisters;

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ters; co-heiresses to freedom, and united in interest.

SCOTLAND (as we before observed) might, with the same propriety, be bound by laws made in England before the union: Their hardy spirit saved them from such injustice; and perhaps similar conduct would have protected Ireland. The one demands^p:—The other implores redress^q.

BY 12 Charles II. c. 34. and 15 Charles II. c. 12. "No persons shall set, plant, &c. "any tobacco, under the penalties therein "mentioned." This statute is diametrically opposite to the opinion of all the judges in the reign of Richard III. ^r (which has

^p Lord George Gordon, in his opposition to relief being granted to the papists who were injured by the riot at Glasgow, declared in the house of commons of England, (March 1779,) that he was invited to head a whole country, who were determined to oppose a relaxation of the popery laws.—*The relief was suspended.*

^q Lord Nugent, with a true patriotic spirit of innocence in distress, in a piteous tale, recounted the Irish loyalty, and requested a small extension of their trade,—and it was refused.

^r Year book.—Mich. 2. R. III. fol. 12.—Merch. of Waterford, v. Sir Thomas Thwaites.

been

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been before hinted) and tho' it is expressly meant to bind Ireland, yet nothing but the folly of the people of that country can make this law a precedent, by cultivating tobacco in consequence of a late act, passed in Great-Britain to repeal it.

THIS repeal, pretended to be a favour, is in fact a mean and insidious artifice to confirm the subordination of Ireland, under colour of extending its commerce; for what can tend more to establish the unjustly claimed subjection of Ireland, than for her to refrain from the cultivation of any article for above a century, because prohibited by an English statute; and then hasten to the culture of it, in consequence of a repeal of that act? But surely there is not a single Irishman so weak, as not to perceive the snare laid to entrap him: Not one so base as to fix his name on the pillar of infamy, that latest posterity may read thereon, the hated name of him who enslaved his country. Husbandmen of Rome have saved their state; let those of Ireland follow the glorious example, and refuse to employ one moment in so destructive a culture.

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BUT planting tobacco in Ireland, will not only be a surrender of our rights, but such a surrender as cannot have any service to plead in excuse. Tho' this repeal is said to be for the benefit of Ireland, a moment's cool reflection will prove it can neither save her at present, nor in future. With the most unremitting labour, tobacco cannot be raised and sent to market as an article of commerce, for some years : Will the expectation of a future profit, satisfy the calls of present hunger?—afford present assistance—or alleviate present distress ? But when will that advantage arrive ? The British ministry, whilst they tell you, they still entertain hopes of regaining America, say as much as that it will never come. Is any man so short-sighted as not to see if that event does happen, the same reason that required America to have the exclusive privilege of raising tobacco, will still subsist : Nay, if they never subdue that country, but are obliged to acknowledge its independence, will they not enter into commercial treaties with it ? And must not tobacco be the great American barter for British exportations ? Then Ireland will be again restricted, and those who have foolishly cultivated that plant, to the shame
of

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of having aided the subjection of their country, they will have the additional mortification of having reduced their most fertile lands, to a state of barrenness : * A just punishment for their baseness and folly ! And that kingdom must again sit down, in complicated poverty.

IF the benefit of Ireland was the motive for this repeal, why were the Irish not rather allowed to bring the produce of the plantations home, without the expence of unloading in an English port ? Or why were they not allowed to assist Great-Britain, in furnishing foreign markets with coarse woollen manufacture, rather than suffer the French to undersel them, (by forcing Ireland for want of a home consumption) to smuggle their wool into that country, without which they could by no means flourish in that trade ; but it is to be feared the intent is bad : If so, there is nothing that has been done, and nothing that can be done, would be more effectual : On the one side the Irish may err ; on the other, they must act right.—

* See Carver on tobacco.

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By 9 of Anne, there shall be one general post-office, to carry all letters from London to Ireland, &c. By 10 Anne, c. 17. a master working in his own ship, whether on the high sea, on the coast, or in any port; and all persons employed on any coasts in boats taking fish, which are brought fresh on shore into Great-Britain or Ireland; and all persons employed in boats, that trade from place to place, on any river, or on the coast, shall pay 6*d.* a month, in support of Greenwich Hospital.

HERE is a statute which, in strictness, is subversive of one of the chief principles of society; a tax is imposed without the consent of the people, and thereby the property of the subject is rendered insecure and precarious. In the case of supplies, the commons of Ireland ever had been, and still continue to be, justly tenacious of that privilege, upon which alone the tottering fabric of their constitution is supported. A recent instance has occurred, when an alteration in Great-Britain, proved the total destruction of a money bill. There is then no great danger to be apprehended from the act becoming an example of sovereignty. "A nation
"tion

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“tion may submit to a reasonable custom
“pointed out by another, but such submission
“is very different from law’.”

THE act of 1 George I. stat. 2. c. 13. prescribes the oath of abjuration to be taken in Ireland. By 1 George I. c. 47. if any person in Great-Britain or Ireland, other than an enlisted soldier, shall by words, &c. prevail on any soldier in the service of his majesty to desert, he shall be subject to the forfeitures therein mentioned.—

THESE are the statutes, from which the advocates for English superiority have drawn their arguments; but when the natural rights of the people;—the charters granted by the three kings of the Norman race, allowing the Irish the enjoyment of the constitution of England, and confirmed by many corroborating statutes.—When the positive denial of the Irish, to be bound by English statutes, not re-enacted by them.—The acquiescence of the several kings to pass laws in Ireland, similar to those in England, al-

* Burlemaquoi, p. 166.

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tho' the parliament of that country obliquely meant to coerce her.—When those are put in the opposite scale, the balance will be found insufficient, and a portion of power will be necessary to give it weight.

THERE is not one express statute to be found to this period, where the English have claimed a supremacy in Ireland: They have enacted laws wherein that nation is mentioned, but have uniformly admitted the Irish to confirm them.

WE are now arrived at an æra, when, by an act of the parliament of Great-Britain, the constitution of this country hath been totally altered. By the grants of the charters from Henry and John, the Irish were to enjoy the privileges of English subjects. They have a parliament chosen by themselves, consisting of three estates—so had Ireland; and to such privileges they should be yet intitled, if the consent of the people had still continued necessary to establish a mode of legislation:—As that has proved a *false position*, there may yet be other means to create one, and the parliament of Great-Britain
hath

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hath adopted another method; for by 6 George I. it is enacted, “ that the kingdom of Ireland hath been, is, and of right ought to be subordinate unto, and dependant on the crown of Great-Britain, as being inseparably united and annexed thereunto, and the king, with the consent of the lords and commons of Great-Britain, hath power to make laws of sufficient force, to bind the people and kingdom of Ireland.”

It is to be wished that the legislators who passed this law, had not thought this right over Ireland so self-evident, that all reason and proof was totally unnecessary; and that the *justice which they administered, and the regard they professed for the people of Ireland, by taking them under their care*, had some more convincing conclusions to satisfy the world, than that because it is “ inseparably united, and annexed to the crown of Great-Britain,” it therefore should be subject to laws made by the parliament of that nation.

THE people of Ireland acknowledge and rejoice, that they are subject to the same crown.

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crown. They are not situated so as to exist independent of every ally—they are not so inhospitable as to desire it.—Their soil and situation are too alluring to remain unmolested, and there are none of their neighbours whose constitution, religion and manners, so nearly coincide: If these inducements should cease, it might be a question how they would conduct themselves.

THE people of Hanover will be dependant on the crown of Great-Britain, so long as it remains in hereditary succession, because so long, the elector of Hanover will sit upon that throne; yet the parliament of Great-Britain hath never claimed a right to bind them by their laws:—It was as uncertain that the king of Ireland should wear the British diadem, as that it should have been enjoyed by the elector of Hanover.

By this statute it is also enacted, “ that
“ the house of lords of Ireland hath not,
“ nor of right, ought to have, any jurisdiction to judge of, affirm, or reverse, any
“ judgment or decree, made in any court
“ in the same kingdom; and all proceedings
“ before

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“ before the said house of lords, upon any
“ such judgment or decree, are void.”

HERE again we are left in the dark, to judge upon what grounds (for surely there must have been cogent reasons) that august assembly were induced to believe a power exerted without controul, for above five hundred years did not give a right. A foreigner, unacquainted with the causes which actuated that parliament, would imagine this a very extraordinary doctrine.

IT is proper in this place, to trace the circumstances which seem to have given rise to this extraordinary claim, of a power existing so long in the Irish house of peers; and to shew the just resentment of the lords, thro' the proceedings, from which it owes its birth.

By an order of the Irish house of lords, Hester Sherlock was put into possession of certain lands in the county of Kildare, and continued it near two years, within which time the chief baron of the Exchequer in Ireland, received an order from the lords of England, to whom Maurice Annesley had
appealed,

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appealed, requiring that court to restore him to the possession of the lands, of which he had been dispossessed, by the order of the Irish lords; upon this order, without any motion in court, the Irish barons ordered an injunction, directed to the sheriff of the county Kildare, for restoring Maurice Annesley to the possession of the lands, which injunction Alexander Burrowes, Esq; high-sheriff, refused to execute, for which he was heavily fined by the barons, and an attachment was issued against him ^u.

IN consequence of these proceedings of the barons, the Irish lords came to several spirited resolutions ^w, in which they approved the conduct of the high-sheriff, and reprobated that of the barons, as betrayers of the king's prerogative, and the liberties of Ireland; they also ordered the barons to be taken into custody, which was executed, and they were committed to prison, *eight* lords only dissenting, of which, one was the chancellor, and five were bishops ^x. These

^u State trials, vol. vi. p. 191.
anno 1719.

^w Lords Journals,
^x Joseph Meath, Welbore Kildare, Henry Killala and Achonry, Tim. Kilmore and Ardagh, Fitz-Williams, Middleton, Canc. Donerayle, William Derry.

proceedings

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proceedings in the Irish house of peers, was combated by a resolution of the English lords, approving the proceedings of the barons in Ireland^y, and recommending them to royal favour, they having been unjustly censured, and illegally imprisoned, for having done their duty; and that a bill be brought into parliament, for securing the dependance of Ireland upon the crown of Great-Britain, which bill was accordingly brought in, and received the royal assent, the 7th of April, 1720.

If Ireland had then continued a separate kingdom, as it formerly had been, and had preserved an independent legislature, the Irish should consider this statute, as a pope's decretal, or an ordinance from an eastern monarch: It might have been an evidence for the insatiate lust of power, which is the characteristic of all commercial nations, but it could not have been a proof of the right claimed by it; and the manner of the Danes who, at this day, endow their daughters in marriage, with a portion of English ground, from an idea of their having conquered

^y Lords Journals, 28th Jan. 1719.

England,

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England, would appear no more unreasonable, than that the English lords should have a right to dispose of Irish property.

SINCE the passing of this statute, several individuals have appealed to the house of lords of England, as a dernier resort; but it would be absurd to adduce the folly, pusillanimity, or wickedness of individuals, in support of usurped authority, which, without such appeals, would of consequence fall to the ground; for how could the lords of England, prohibit the Irish peers from proceeding, if a spirited appellant should, as he ought, apply to those only? By what right could the Irish lords refuse to decide, if their authority was laid before them, by the most evident demonstration? It is not discretionary, but compulsive in a court of justice, to render justice.—The British legislature might then make declaratory laws to eternity. What effect had their acts upon America? An excellent precedent for prudence.

WHEN nations dispute upon the principles of liberty, there is but one law can arbitrate—the *ultima lex*.

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It may be said that the continual appeals which are made to England, are evidences of the Irish acquiescence, but the resolutions of the Irish lords are sufficient bars to that assertion; however if they are not, yet there is a maxim in the laws of England, that a right may sleep, but can never die. In the case of the prior of Lanthony, in Wales^z, who appealed from Ireland, to the parliament of England, they did not attempt to act judicially, and nothing appears to have been done herein, but entering the petition on the parliament roll, anno 1430. Yet this was in a reign, when the prerogative of the crown was much restrained, and when the two houses of parliament, extended their authority to unwarrantable bounds.

THE parliament of Ireland, hath on all occasions behaved with becoming spirit, when their judicial power was in danger, tho' they have wanted force to support their independence.

ON the 11th of February, 1703^a, upon a petition from Edward, earl of Meath, and

^z Pryn. against 4 Inst. c. 76. p. 313.

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Cecilia his wife, "they resolved," (*nemine contradicente*) "That by the antient and
"known laws and statutes of Ireland, her
"majesty hath an undoubted jurisdiction,
"and prerogative of judging in this her
"high court of parliament, in all appeals
"and causes, within her majesty's realm of
"Ireland."

"RESOLVED, (*nem. con.*) that the de-
"terminations and judgments of this high
"court of parliament, are final and conclu-
"sive, and cannot be reversed or set aside
"by any other court whatsoever."

"RESOLVED, (*nem. con.*) that if any
"subject or resiant within this kingdom,
"shall hereafter presume to remove any
"cause, determined in this high court of
"parliament, to any other court, such per-
"son or persons shall be deemed betrayers
"of her majesty's prerogative and jurisdic-
"tion, and the undoubted antient rights
"and privileges of this honourable house,
"and of the rights and liberties of the sub-
"jects of this kingdom."

* Lords Journals.

"RESOLVED,

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“RESOLVED, (*nem. con.*) that if any
“subject or resiant within this kingdom,
“shall presume to put in execution any or-
“der from any other court, contrary to the
“final judgment and determination of this
“high court of parliament, such person or
“persons shall be deemed betrayers of her
“majesty’s prerogative and jurisdiction, and
“the undoubted antient rights and privi-
“leges of this house, and of the rights and
“liberties of the subjects of this kingdom.”

THESE resolutions were firm, just and noble.—They speak the sentiments of men, descended from a race of antient heroes, and fully prove the assumed authority of the British peers, can only be supported by such betrayers of the liberties of Ireland, as appeal to them for justice: If the same animated blood flow in the veins of the present lords, they can only want the general concurrence of the people, to hear and determine in the dernier resort, and it is not to be doubted but they would support their decree, with coolness and fortitude.

THERE still remains to be reconciled one argument, which is sometimes used in
support

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support of the English supremacy: It is said that unless Ireland is subordinate to Great-Britain, why shall a writ of error be brought from the king's bench in that kingdom, to the king's bench in England?

It hath been mentioned, that the lord justice of Ireland, sent a message to the king of England, to determine a point of law, which the judges of Ireland, from the novelty of the English code, were not able to decide, and that the king resolved the question. It is not unnatural to presume, that this decision led many individuals, against whom decrees were made, to apply to the same power for a definition of the laws of which they conceived they did not receive the benefit, and no place was so likely to find the sovereign in his judicial capacity, as on that bench, where he used to preside, and which at this day is called, *curia domini regis*, and every cause brought therein, is said to be *coram domino regi*.—This presumption appears the more reasonable, when we consider that when a writ of error is brought into England, the judges are *obliged* to determine, and always do determine according

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cording to the laws of Ireland ^b, when there is any difference between them, and the laws of England. And the utmost authority of that court, extends no farther than when the error is brought by the defendant, to reverse the judgment; and when assigned by the plaintiff, to give such judgment as the court below should have given ^c.

BUT if this éven proved a subordination, yet it does not follow that the people of this country, shall be dependant on the legislature of Great-Britain. Tho' the consent of the people, hath been universally held to be necessary in giving force to law; yet when the law is enacted, it is not of great consequence by whom it is announced.—In fact, it is the duty of every man to declare it.

THUS stands the claim of the parliament of Great-Britain, to bind Ireland by laws made in that kingdom; and tho' it is necessary that this work shall contain such statutes, as have been enacted there for this purpose, yet those in whom is lodged a power

^b Cro. Car. 511. Error was assigned that the declaration was of an hundred acres of bog, which *would be error in England*, as no such distinction of land is known there; but as it is a description well known in Ireland, it was judged *no error*.

^c 1 Salk. 262.

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of asserting their privileges, and who should be the sacred guardians of the people, would do well to remember the words of Sir William Blackstone: "That they are bound
" by every tie of honour, nature, and religion, to transmit that constitution, and
" those laws, to their posterity, amended, if
" possible, at least without any derogation^a."

FROM all that has been urged in the foregoing premisses, the following conclusions will naturally follow :

1st, THAT in admitting the sovereignty of the kings of England, Ireland was never beheld as a conquered country, but such admission was the effect of compact, not the result of conquest.

2d, THAT the adoption of the English code of laws, was in consequence of their superior utility to the Brehon laws, and not the receiving laws from a conqueror, nor any mark of submission to the English legislature.

3d, THAT tho' Ireland is dependant on the crown of England, it is by no means so on its parliament.

4th, THAT by the compact made with Henry II. and succeeding kings, the subjects

of

^a Vol. i. p. 9.

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of Ireland were intitled to every right, privilege, franchise and immunity, equal with those of England.

5th, THAT for a long series of years, no laws made by the English parliament, even tho' Ireland was especially named, were accounted binding on Ireland, until they were re-enacted and confirmed by the Irish parliament.

6th, THAT in the reign of Charles II. when the spirit of despotism, so natural to the family of the Stuarts, made encroachments on the liberty of the English subject, it began to attack that of the Irish, by pretending to bind them with English statutes.

7th, THAT in subsequent times the encroachments augmented, and were encouraged by the obligations of the Irish to submit to them, from the superiority of power the English possessed; but acquiescence does not constitute a right, nor make that constitutional, which is contrary to reason, a breach of original compact, and the manifest oppression of force.

8th, THAT the present British parliament, the well known creature of that system of corruption, first matured by Sir Robert Walpole, hath endeavoured to establish

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blish the absurd proposition, of Ireland being subject to its laws. In the execution of its design it hath acted as weakly as wickedly, for whilst its designs are to enslave a brave and free people, dependent only on its power, it hath taken such steps as are the manifest effects of ignorance of the strength and utility of Ireland, and of the true interests of Great-Britain; and in order to usurp an authority, which can answer no good or wise purpose, but tend to alienate the minds of millions of his majesty's loyal subjects, and rouse a spirit which must naturally result from a series of oppression, and a train of distresses, enough to drive them to despair.

To these injuries the late repeal of the tobacco act, adds insult; for what is it but insulting common sense, and mocking the miseries of a whole people, to hold out the badge of slavery under the guise of a benefit, and tell them they are to be relieved from their distresses, by means that can only operate to rivet their chains, and undermine their constitution.

—*Nec tali auxilio*
Nec defensoribus istis—

VIRGIL.

A COM-

A
COMPARATIVE VIEW
OF THE
COMMON AND STATUTE
L A W S
OF
ENGLAND AND IRELAND.

C H A P. I.

Of the absolute Rights of Individuals.

BY the absolute *rights of individuals*, we mean those which are so in their primary sense; such as would belong to them in their state of nature, and which every man is entitled to enjoy, whether out of society, or in it. It is not to be expected that any human law should at all explain or enforce them—the end of such being only to regulate our actions as we stand in various relations to each other as members of society.

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2 A COMPARATIVE VIEW of the

Let a man be ever so depraved in his principles or vitious in his actions, provided he keeps them to himself, no human law can correct him.—But if they are public, then from the bad example they set, they are within the reach of human censure and controul.

PUBLIC propriety is a relative duty:—private propriety is an absolute duty—the former the municipal law can regard;—the latter, it never can. The absolute rights of man considered as a free agent, are contained in one general appellation of natural liberty.—But every man when he comes into society, gives up part of his *natural liberty** as the price for so valuable a purchase. Thus he obtains the right of *personal security*, or uninterrupted enjoyment of his life, limbs, body, health, and reputation.

LIFE is the immediate gift of God, and begins in contemplation of law as soon as the infant is able to stir in the mother's womb.—For if a woman is quick with

* Since this treatise was written, there has been a pamphlet published by Cha. Fran. Sheridan, Esq; wherein it is argued with great ingenuity, that man hath not parted with any portion of his natural liberty by entering into society.

child,

child, and by a potion or otherwise killeth it in her womb, it is a heinous misdemeanour (1).

AN *infant en ventre sa mere* is capable of having a legacy or a surrender of a copyhold made to it. It may have a *guardian* assigned to it, by 12 C. II. c. 24^b. And may have an estate limited to its use, and to take afterwards by such limitation, by 10 and 11 W. III. c. 16^c.

A *man's limbs* (such as are useful to him in fight, and the loss of which, amounts to mayhem) are also the gift of God, and are peculiarly protected by the law, to enable him to preserve himself from external injuries.

THE law pardons even *homicide* if committed *se defendendo*, to preserve either life or limbs. If a man thro' fear of death or *mayhem* is prevailed on to execute a deed or to do any other legal act, he may afterwards avoid it, if done on a well grounded apprehension of losing either, on non-compliance (2). This constraint is called *duress*, of which there are two sorts—*duress of imprisonment*, of which we shall treat here-

(1) 3 Inst. 50.

^c 8 A. c. 4. §. 1.

^b 14 and 15 C. II. c. 19. sect. 3.

(2) 2 Inst. 483.

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after: and *duress per minas*, where the hardship is only threatened, such as has been mentioned. A fear of battery or being beaten tho' ever so well grounded, is no duress,—nor is the fear of having one's house burned, or one's goods taken and destroyed (3). Any constitution which vests in a man, or a number of men, a power of taking away the life of an individual without law, is tyrannical. And any law that directs such destruction on slight and frivolous occasions is tyrannical. The statute law of England, seldom, and the common law, never inflicts such punishments, unless on the highest necessity.

BESIDES those limbs which may be necessary to defend a man, the rest of his *person* is intitled to security from personal insults. The preservation of a man's *health* and *reputation* are rights to which every man is intitled.

NEXT, as to *personal security*, the law of England regards and preserves the *personal liberty* of individuals—particularly by 31 C. II. c. 2. called the *habeas corpus act*^a, by which no

(3) 2 Inst. 483.

^a No such act in Ireland.—The parliament attempted to obtain it, but it was thrown out in the privy council.—It is the principal barrier for defending the liberties of the people from the oppression of prerogative, and its utility is sufficiently known to make us feel the want of it.

subject

subject in England can be long *detained in prison*, except in those cases in which the law requires such detainer—and lest this act should be evaded by requiring unreasonable bail, it is declared, by 1 W. and M. st. 2. sect. 2*. that *excessive bail* ought not to be required. To confine a person in any wise is an imprisonment.—Keeping him in a private house, or arresting him in the street, is imprisonment (4). And if a man be in duress of imprisonment, which is an illegal restraint, and seals a bond or the like, he may alledge the duress and avoid the bond.—But if he be lawfully imprisoned, and then seals a bond, this he is not at liberty to avoid (5). To make an imprisonment lawful, it must be by process from some court of judicature; or by *warrant* from some legal officer, which must be in writing under the hand and seal of the magistrate, and express the cause of the commitment: If there be no cause expressed, the goaler is not bound to detain the prisoner (6). A natural consequence of this liberty is, that every man may claim a right to abide in his own country. The king may issue his writ of

* Eng. stat. West. 1. 3. Ed. I. c. 15. If any hold a prisoner after he hath tendered sufficient bail, they shall be grievously amerced.

(4) 2 Inst. 589.

(5) Ibid. 482.

(6) Ibid. 52, 53.

ne exeat regnum, and prevent a subject to leave the kingdom (7); but no power but parliament can send a man out of the kingdom without his consent—not even a criminal. By 31 C. II. c. 2. no subject of the realm shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or places *beyond sea*, but that all such imprisonments shall be illegal—and the person who shall commit contrary to this law, shall be disabled from holding any office—shall incur the penalty of a premunire—and be incapable of receiving the king's pardon. And the person suffering shall have his action against the person committing, and all his aiders, advisers, and abettors, and shall recover treble costs besides his damages, which shall not be assessed at less than five hundred pounds. Yet soldiers and sailors from the nature of their employment may be sent abroad. But a man cannot be made a lord-lieutenant of Ireland, or a foreign ambassador against his will (8).

Property is a third inherent right of every Englishman, which consists in the free use and disposal of his acquisitions—without any controul, save the laws of the land;—and so jealous is the law of it, that if a new road, for instance, was to be made thro' the ground

(7) F. N. B. 85.

(8) 2 Inst. 46.

of a private person which might be useful, yet no set of men can do this without consent of the owner. But in this and similar cases the legislature does sometimes interpose, and compel the individual to acquiesce, on giving him a full equivalent for the injury thereby sustained.

THESE three fundamental rights of personal security;—personal liberty and personal property are protected and maintained by the constitutions, powers and privileges of parliament. By the limitation of the king's prerogatives by bounds so certain and notorious, that it is impossible to exceed them without the consent of the people.—By the right of applying to the courts of justice for redress of injuries.—By *magna charta* no freeman shall be outlawed, but by the law of the land.—By 2 Ed. III. c. 8. no command shall come under the great or privy seal, the signet or little seal, in disturbance of law; and if such shall come, the judge shall not delay to do right, which by 18 E. III. ft. 4. is part of their oath.—By 1 W. and M. ft. 2. c. 2^f. the pretended power of suspending
or

^f This act as well as all others passed in England declaratory of the common law, have force in Ireland by the general establishment of that law, because they do not create

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or *dispensing* with laws, or the execution of laws, is illegal, by regal authority, without consent of parliament. Not only the substantial, but the formal part of law, cannot be altered, but by parliament.—By 16 C. I. c. 10. neither his majesty, nor the privy council have any power by English bill, petition, article, libel, or by any other arbitrary way, to examine or draw into question, determine or dispose of the lands or goods of any of the subjects of this kingdom, but that the same ought to be tried and determined in the ordinary courts of justice and by course of law. If there should happen any uncommon injury which the ordinary course of law cannot reach, there remains the right of petitioning the king, or either house of parliament, with these restrictions, by 13 C. II. ft. 1. c. 5^s. where

create any new, but only recognize the known rights of the subject, to which the parliament of Ireland consented under the reigns of different kings. Such is the bill of rights, which after recapitulating the claims of the people, concludes with asserting that these claims are their antient, inherent and indubitable birth-right. Such are the laws of H. III. called the Charter of the Forest, and Great Charter of the liberties of England, which declare and confirm the common law, as laid down by 25 Ed. I. c. 1. and proved in Prince's case, 8 Co. 2. inst. 6. Chron. Gervasii Dorobom. 1387. edit. 1652.

^s Eng. ft. 1 W. and M. ft. 2. c. 2. §. 1, declaratory law.

it

it is provided, that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter be approved by three justices of the peace, or the major part of the grand jury in the country, — and in London, by the lord mayor, aldermen and council ;—nor shall any petition be presented by more than ten persons at a time. But under these regulations it is declared, by 1 W. and M. ft. 2. c. 2^h. that the subject hath a right to *petition*, and that all commitments and prosecutions for such are illegal. The last right of the subject is to have *arms* for his defence, suitable to his condition and degree, and such are allowed by the said last mentioned statute¹.

^h Eng. ft. declaratory of the com. law.

¹ Eng. ft. declaratory of the com. law.

C H A P. II.

Of the *Parliament* ^a.

THE constitution of parliament, as it has stood for above five hundred years, consists, 1st, In the manner and time of its assembling. 2d, Its constituent parts. 3d, The laws and customs relating to parliament considered as an aggregate body. 4th and 5th, The laws relating to each house separately. 6th, The method of making statutes in both houses. 7th, The manner of its adjournment, prorogation and dissolution^b.
1st, THE

^a It is observable that the parliament of Ireland, according to the learned Petys, keeper of the records in the tower, sat, 38 H. III.—eleven years before the commons of England, who did not sit until 49 H. III. And Mr Prynne, in his discourse against the 4th inst. p. 259, acknowledges a parliament to have been held in Ireland in the reign of H. II.

^b By 3 and 4 P. and M. c. 2. sect. 1, 2, 3. Before the meeting of the parliament in Ireland, the chief governor and council must certify to the king under the great seal the causes, &c. of such acts as they shall then think meet to be enacted, to which his majesty's answer expressing his pleasure, either for passing them in such form as they should be sent into England, or else the alteration of them must be first had under the great seal there:—And during the time of every parliament to be holden, the said chief governor,

1st, *THE parliament is to be summoned* by the king's writ issued out of chancery, by advice of the privy council, at least forty days before it begins to sit. No parliament can be convened by any authority, except the king alone.—The *convention* parliament which restored king Charles met above a month before his return; the lords by their own authority; and the commons in pursuance of writs issued in the name of the keepers of the liberty of England; they sat after the restoration, and enacted many laws, several of which are still in force—But this for the necessity of the thing.—So at the time of the Revolution, 1688; the lords and commons, by their own authority, and by the summons of the prince of Orange, met and disposed of the crown. But this was on a like princi-

governor, &c. may certify any other such ordinances as they shall think good to be enacted; and any such ordinances as shall be returned under the great seal of England, and none other, shall be enacted in any such parliament.—By 11 El. sess. 3. c. 8. no bill shall be certified into England to repeal or suspend the 10 H. VII. c. 4. (commonly called Poyning's law, and of which the above is an explanation) unless agreed on in a parliament by a majority of lords and commons then present.—From these restrictions the author of a Survey of the South of Ireland, in letters to Dr. Watkinson, published in London, 1777, has asserted that the legislature of Ireland consists of *six* parts.

ple

ple of necessity. By 16 C. II. c. 1.^c the meeting and holding of the parliament shall not be intermitted above three years. And the same provision is made by 6 W. and M. c. 2.

2d, THE constituent parts of a parliament are, the king, and the three estates of the realm; the lords spiritual and temporal, who sit with the king in one house; and the commons who sit in another. On their coming together, the king meets them either in person, or by representation, without which there can be no beginning of a parliament (1). Of the king we will treat in the next chapter.

THE next are the *lords spiritual*; these consist of the two *arch-bishops*, and twenty-four *bishops*^d. Tho' they are in the eye of the law a distinct estate from the lords temporal, yet in practice they are usually blended together under the name of lords. They intermix in their votes, and the majority of such intermixture binds the whole.

THE *lords temporal* consist of dukes, marquisses, earls, viscounts, and barons. Some

^c Eng. st. 1. W. and M. st. 2. c. 2. sect. 1. declaratory law Parliaments ought to be held frequently.

(1) 4 Inst. 36. Four archbishops and eighteen bishops.
fit

fit by descent, as do all old peers. Some by creation, as do all new made ones. Others by election, as the sixteen peers for Scotland. Their number is indefinite, and may be created at the will of the crown.

THE *commons* consist of such men of any property in the kingdom as have not seats in the house of lords; every one of which has a voice in parliament personally, or by representative. The number of English representatives is 513; and Scots 45, in all 558.

3d, THE *laws and customs relating to parliament*, as an aggregate body. It is so transcendent, that it cannot be confined, either for causes or persons, within any bounds(2). In order to prevent the mischiefs that may arise by placing this authority in hands incapable or improper, it is provided by the custom of parliament (3), that no one shall sit in either house until he is twenty one years of age. This is also expressly declared, as to the house of commons, by 7 and 8 W. and M. c. 25.—By 7 J. I. c. 6. No member shall be permitted into the house of commons till he has taken the oath of allegiance before the lord steward, or his

* 300. (2) 4 Inst. 36. (3) Whitelocke, c. 50. deputy.

deputy.—By 30 C. II. ft. 2. and 1 G. I. c. 13^f. No member shall vote or sit in either house until he hath in the presence of the house taken the oaths of allegiance, supremacy and abjuration, and subscribed and repeated the declaration of transubstantiation and invocation of saints, and sacrifice of the mass.—By 12 and 13 W. III. c. 2^e. No alien, even tho' he be naturalized, shall be capable of being a member of either house. And by the custom of parliament, if any person is made a peer by the king, or elected to serve in the house of commons, yet may the respective houses on complaint of any crime and proof thereof, adjudge him disabled and incapable to sit (4). The *privileges of parliament* are very great and indefinite.—By 1 W. and M. c. 2^h. Freedom of speech and debates, and proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament. The members and

^f Eng. ft. 3 and 4 W. and M. c. 2. sect. 5. the declaration against transubstantiation, and the oaths of allegiance and supremacy, and by Eng. ft. 1 A. c. 17. sect. 10. the oath of abjuration, except they may first vote for a peer.

^h Eng. ft. 22 G. II. c. 45. sect. 10. (4) Whitlocke of parliament, c. 102. Lord's journals, 3 May, 1620. Commons journal, 17 Feb. 1769.

^b Eng. ft. declaratory of the common law.

their

their servants are free from arrests. To assault a member, or his servant, is a high contempt of parliament, and there punished with the utmost severity. It has peculiar penalties annexed to it in the courts of law, by 5 and H. VI. c. 6. H. VI. c. 11. These privileges extend to prevent an entry on his lands, or his goods to be distrained or seized. But all those privileges, (except of person, which in a peer, is for ever¹, in a commoner for forty days after the prorogation, and forty days before the next appointed meeting) (5) endure, by 12 W. III. c. 3. and 11 G. II. c. 24^k. no longer than the session of parliament; they all cease immediately after the dissolution, or prorogation, or adjournment of the houses for above a fortnight,—and during these recesses a peer or commoner may be sued like an ordinary subject, and dispossessed of his lands and goods. The king, by his prerogative, may sue a member for his debts during the sitting of parliament, but not arrest him^l.—By 2 and 3 Ann. c. 18^m. A member may be sued during

¹ 6 Ann. c. 8. sect. 3.—The privilege from arrests shall begin 40 days before, and continue for forty days after each sitting. (5) 2 Lev. 72. ^k 11 and 12 G. III. c. 12. sect. 1. continued by 15 and 16 G. III. c. 30. sect. 1. for ten years. Suits may be commenced during the sitting of parliament with a saving from arrests.

^l 1 G. 2. c. 8. sect. 5.

^m 6 Ann. c. 8. sect. 6.

the sitting of parliament for any misdemeanour, or breach of trust, in a public office.—By 4 G. III. c. 33^a, any trader having privilege of parliament may be served with legal process for any just debt (to the amount of one hundred pounds and unless he makes satisfaction within two months, it shall be deemed an act of bankruptcy. If a privileged person shall be arrested, he shall be discharged on motion, by construction of 12 W. III. c. 3. No privilege is allowed to a member, his family or servants, for any crime whatsoever. And privileged persons have been convicted of misdemeanours, and committed, or prosecuted to outlawry in the middle of a session (6). Writing and publishing seditious libels was resolved by both houses, not to be entitled to privilege (7);—and that the reasons extended equally in every indictable offence (8). So

^a 11 and 12 G. III. c. 8. sect. 1. And by 17 and 18 G. III. c. 48. sect. 3, 4. it is enacted, that before such privileged person shall be served with such process, the creditor to whom such debt shall be owing, must make and lodge in some court of record in Dublin, an affidavit verifying the debt, and that he believes such person to be a trader; and if such person will then enter into a bond, with sufficient sureties, to pay the sum and all costs that shall be recovered by action, he shall not be adjudged a bankrupt.

(6) Mich. 16 E. IV. in scacca.—L. Raymond, 1461.

(7) Commons journal, 24. Nov. Lords journal, 29. Nov. 1763.

(8) Lords protest. *ibid*.

the

the only privilege of parliament in such case is, to give the house notice of the imprisonment of the member, with the reason for which he is detained. This is daily practised on the slightest military accusations, preparative to a trial by court-martial (9); and which is generally recognized by the several temporary statutes for suspending the habeas corpus.

4th, THE laws and customs relating to the lords in particular.—The chief of which is their judicial power, of which more hereafter.—By 9 H. III. they have a right in going to and returning from parliament thro' the king's forests to kill *one or two of his deer* without warrant, in view of the forester, if he be present; or on blowing a horn, if he be absent. They have a right to be *attended* in parliament by the judges of the courts of king's bench and common pleas, and such of the barons as have been made serjeants, and the masters of the chancery. The secretaries of state, the attorney and solicitor-general, and the rest of the king's council, being serjeants, are to this day summoned, by 31 H. VIII. (10)

(9) Commons journal, 20 April, 1762.

(10) Smith's commonw. b. 2. c. 3.—Moor 551. 4 inst. 4.—Hale of parl. 140.

Every peer, by licence obtained from the king, may make another lord of parliament, his *proxy* to vote for him in his absence (11). Each member has a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with his reasons, which is called *his protest*. All bills which in their consequence may affect the power of the peerage, are to have their rise in that house—and to suffer no changes or amendments in the house of commons—By 6 Ann. c. 23. which regulates the election of the sixteen Scots peers (in consequence of the 22d and 23d articles of the union) and prescribes the oaths to be taken by the electors, directions are laid down for the mode of ballotting—prohibiting the peers electing from being unusually attended—and expressly providing that no other matter shall be treated of in that assembly, on pain of incurring the penalty of *præmunire*.

5th, THE peculiar laws and customs of the house of commons relate principally to the raising taxes and electing members. It is an indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids do begin in their

(11) Seld. Baronage, p. 1. c. 1.

house.

house. (12) And they will not suffer the least alteration to be made by the lords to the *mode of taxing* by a *money bill*. The salutary provisions for *electing* members are reduced to three points. 1st, The qualifications of the electors. 2d, The qualifications of the elected. 3d, The proceeding at elections.

1st, OF qualifications of electors for *knights of the shire*, 8 H. VI. c. 7. and 10. H. VI. c. 2. direct that they shall be chosen of men dwelling in the same county, of 40 shillings a year freehold estate, clear of all charges and deductions, except parliamentary and parochial taxes°. No person under twenty-one years of age shall vote for any member^p. No person convicted of perjury, or subornation of perjury, shall have a vote^q. No person shall vote from any freehold given to him fraudulently to qualify him to vote,—such as contain an agreement to reconvey—or to defeat the estate granted; and such agreements are made

(12) 4 Inst. 29.—See the instance of the commons rejecting a money bill altered by the lords.

° 19 G. II. c. 11. sect. 2. requires all freeholds under ten pounds, to be registered with the clerk of the peace six months before election. ^p 3 G. III. c. 13. sect. 7.

^q 2 G. I. c. 19. sect. 1.

C 2

void,

void, and the estate vests in the grantee. Every voter shall have been in the possession or receipt of the profits of his freehold to his own use for twelve calendar months before, except it came by descent, marriage, marriage settlement, will, or promotion to a benefice or office'. That no person shall vote in respect of an annuity or rent charge, unless registered with the clerk of the peace twelve months before'. In mortgaged estates the person in possession shall have the vote. That only one person shall vote for any one house or tenement. That no estate shall qualify a voter unless it has been assessed to some land-tax aid at least twelve months before the election. That no tenant by copy of court roll shall vote as a freeholder. The right of election in *boroughs* is various,—depending on special local customs, and by 2 G. II. c. 24^o. the right in voting shall be allowed, according to the last determination of the house of commons

' 21 G. II. c. 10. sect. 1. freehold before vacancy with like exception. ' 21 G. II. c. 10. sect. 1. if the annuity be under ten pounds per an. ' 1 G. II. c. 9. sect. 6.

' 11 G. III. c. 12. sect. 1, &c. made per. by 13 and 14 G. III. c. 15. sect. 1, &c. all controversies in elections shall be referred by petition to the house, who shall appoint a day to take such into consideration, whereof notice shall be given:—and the subsequent sections to 33. prescribe the mode of trying the same.

con-

concerning it.—By 3 G. III. c. 15^v. no free-man of any city or borough shall be *admitted to vote* therein, unless he hath been admitted to his freedom twelve calendar months before (other than such as claim by birth, marriage or servitude.)

NEXT, As to the *qualification of persons* to be *elected* members. They must not be aliens born, or *minors*. They must not be any of the twelve judges (13)—nor of the clergy (14)—nor persons attainted of treason or felony (15). Sheriffs of counties, mayors and bailiffs of boroughs are not eligible in their respective jurisdictions, as being returning officers (16). But they may be elected for other places (17). No * persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury, nor any of the

* 21 G. II. c. 10, sect. 1. Freedom before the vacancy with like exceptions.

(13) Com. jour. 9 Nov. 1605. (14) Ibid. 13 Oct. 1553.—8 Feb. 1620.—17 Jan. 1661. (15) Ibid. 21 Jan. 1580. 4 inst. 47. (16) Ibid. 25 June, 1604.—14 Ap. 1614.—22 Mar. 1620—2, 4, 15 June, 17 Nov. 1685. Bro. abr. t. parl. 7.—Hal. of parl. 114.

(17) Whitlocke of parl. c. 99 —100.—101.—4 inst. 48.

* Any natural born subject may be elected to represent any county, &c. in parliament,—yet persons have forfeited that right, and have been declared ineligible.

officers

officers following, (commissioners of prizes, transports, sick and wounded; wine licences, navy, and victualling; secretaries or receivers of prizes; comptrollers of the army accounts; agents for regiments; governors of plantations, and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; clerks or deputies in the several offices of the treasury; exchequer, navy victualling, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licences, hackney coaches, hawkers and pedlars) or any persons that hold any new office under the crown, created since 1705, are incapable of being elected members. No person having a *pension* under the crown during pleasure, or for any term of years, is capable to be elected. If any member accepts an office under the crown, except an officer in the army or navy, accepting a new commission, his seat is void, but he may be re-elected.

EVERY knight of a shire shall have a clear estate of freehold or copyhold, to the value of six hundred pounds per ann. and every citizen and burghers three hundred pounds per ann. except the eldest sons of peers—and of persons qualified to be knights of shires—and except the members of the two universities. There are instances wherein persons qualified
have

have forfeited their common right, and have been declared ineligible for that parliament, by a vote of the house of commons; or for ever, by an act of the legislature.

THE method of proceeding at elections is regulated by the law of parliament, and by several statutes—from which it appears—That when the parliament is summoned, the lord chancellor (or if a vacancy happens during parliament, the speaker by order of the house) sends a warrant to the clerk of the crown in chancery, who thereon issues out writs to the sheriff of each county for the election of all the members to serve for that county, and every city and borough therein*:—within three days after the receipt of the *writs*, the sheriff is to send a precept under his seal to the returning officers of the cities and boroughs, commanding them to elect their members—and they are to

* 1 G. II. c. 9. sect. 1, 2. Sheriffs to send the precept within four days, and returning officer to proceed to election within twenty-one days, giving same notice.—And by 11 and 12 G. III. c. 10. sect. 1. the speaker is directed in any recess for more than twenty days to issue new writs for electing members in the room of such as shall die during the recess, subject to the conditions therein expressed, which act is amended and extended, by 15 and 16 G. III. c. 11. sect. 1, 2. to the election of members, who in such recess shall be called up to the house of peers.

proceed

proceed to election within eight days from the receipt of the precept, giving four days notice thereof—and to return the persons chosen, with the precept, to the sheriff,

ELECTIONS for knights of the shire must be proceeded to by the sheriffs in person^y, at the next county court that shall be held after delivery of the writ. If the county court falls on the day of the delivery of the writ, or within six days after, the sheriff may adjourn the court and the election to some other time, not longer than sixteen days, nor shorter than ten. But he cannot alter the place^z without consent of all the candidates. And ten days public notice must be given of the time and place of the election. All soldiers quartered in county towns or boroughs must remove at least one day before the election two miles at least, and not return till one day after the poll is ended. Riots make an election void. No lord of parliament or lord-lieutenant of a county, or lord-warden of the cinque ports shall interfere in elections. If any officer of

^y 2 G. I. c. 19. sect. 5. or by his undersheriff, or such as he shall depute, which deputy is directed by 15 and 16 G. III. c. 16. sect. 1. to be appointed when a poll shall be demanded at a place where, upon a former election, the number of electors have exceeded four hundred.

^z 2 G. I. c. 19. sect. 5.

excise, customs, or stamps, or certain other branches of the revenue, presumes to meddle in elections by persuading or dissuading any voter, he forfeits one hundred pounds, and is disabled to hold any office^a. No candidate shall after the *date* of the writ, or after the vacancy, give any money or entertainment to his electors, or promise to give any to particular persons, or to the place, on pain of being incapable to serve that place in parliament^b. And if any money be given to any voter to give or withhold his vote, he that offers as well as he that takes, shall forfeit five hundred pounds, and is for ever incapable of being elected or holding any office in any corporation—unless before conviction he will discover some other offender of the same kind, which indemnifies him of his own offence^c. The sheriff or other returning officer must take an oath against *bribery*, and for the due execution of his office, on the first day before he begins. The candidates, if required, must swear to their qualification^d—and the electors in counties, to theirs^e. The electors

^a 2 G. I. c. 19. sect. 8. and by 15 and 16 G. III. c. 16. sect. 14, 15. he is incapacitated from sitting in parliament.

^b 3 G. III. c. 13. sect. 8.

^c Ibid. sect. 4.

^d 15 and 16 G. III. c. 16. sect. 8.

^e 3 G. III. c. 13. sect.

tors of cities and boroughs are compellable to take an oath against bribery and corruption, and of abjuration^f. The sheriff must return the writ, and those elected, to chancery before the day of meeting (if a new parliament) or if an occasional vacancy, within fourteen days after the election, under the penalty of five hundred pounds. If he does not return such knights as are duly elected, he forfeits, by H. VI. one hundred pounds, and the returning officer in boroughs forty pounds; and besides, by later statutes of W. III. is liable to an action, in which double damages shall be recovered^g. Any person bribing the returning officer, shall forfeit three hundred pounds. But the members returned, are the sitting ones, until the house on petition shall judge the return illegal.^h

sect. 1. And members of counties, against bribery and corruption. And by 15 and 16 G. III. c. 16. sect. 12. another oath is prescribed for the inhabitants of boroughs.
^f 1 G. II. c. 9. sect. 4. and by 15 and 16 G. II. c. 16. sect. 1. another oath is prescribed. ^g By the 15 and 16 G. III. c. 16. sect. 4, 5. No riot shall induce him to close the pole, but in such case he shall adjourn until a more convenient time. In case of an equality of votes, he is directed to give a casting voice, whether otherwise qualified or not; and if he returns more than the number directed by the writ, he forfeits two thousand pounds. 15 and 16 G. III. c. 16. sect. 6. no person shall vote out of any rent charge of less than twenty pounds yearly value. ^h By 11 G. III. c. 12. made perpetual, by 13 and 14 G. III. c. 15. sect. 1.

6th, THE

6th, THE method of making *laws*. If private relief be sought, a petition must be preferred by a member, setting forth the grievance—which is referred to a committee, and on their report, leave is given to bring in the bill. In public matters it is brought in on motion. It is presented on paper, with large blanks left for amendments, if necessary. In the lords, if it be of a private nature, it is referred to two judges. The *bill* thus brought in, is read a first, and then a second time; after each reading, the speaker opens the substance of it, and puts a question, if it shall proceed any farther. At any stage it may be opposed, and if the opposition succeeds the bill is dropped for that session.—After the second reading, it is referred to a *committee*, either of a few members, or of the whole house, according to its consequence. Here it is debated clause by clause. After it is gone thro' the committee, the chairman reports it to the house.—Then the house re-consider it, and the question is put on each clause. When they have agreed, it is engrossed, and then read a third time, and sometimes amended. If a new clause be added, it is by tacking a separate parchment to the bill, called *a rider*. Then the question is put, if the bill shall pass.—
Then

Then the *title* is settled.—Then one of the members carries it to the lords, and desires their concurrence. If there passes thro' the same forms;—if rejected, no more notice is taken. If agreed to, the lords send a message by two masters in chancery, or two judges, and it remains with the lords. If there are any amendments, they are sent to the commons with the bill for their concurrence. If they disagree,—a conference follows between members deputed by each house. If both houses remain inflexible, it is dropped. If the amendments are agreed to, the bill is sent back by one of the members. The same forms are observed *mutatis mutandis*.—But when an *act of grace* is passed—it is first signed by the king, and then read once only in each house, without any amendment (18). All bills lye in the house of lords to wait the *royal assent*, except a money-bill, which after receiving the lords concurrence is sent back to the commons (19).

THE royal assent is given by the king in person; or by commissioners, by letters patent under the great seal, and signed by himself. In either of which cases, when it

(18) Com. jour. 17 June, 1747. D'ewes journ. 20.
73 (19) Com. journ. 24 July, 1660.

has received the royal assent, it is an *act of parliament*.

7th, PARLIAMENTS may be adjourned, prorogued, or dissolved.

AN *adjournment* is the continuance of the *session* from day to day, or sometimes for a week or month together. After an adjournment all bills remain in the same state as before; but by *prorogation* (which is the continuance of the parliament from one session to another) all bills not finished must be resumed *de novo* (if at all). It is prorogued by the chancellor in the king's presence; or by commission from the crown. Unless some act be passed or judgment be given in parliament, it is no session at all (20). By 30 G. II. c. 25. if at the time of an actual rebellion, or imminent danger of an invasion, the parliament shall be separated, the king may call them together by proclamation, giving fourteen days notice.

A DISSOLUTION may be effected, 1. By the king's will, expressed in person or by representation. 2. It may be dissolved by *demise of the crown*, by 7 and 8 W. III. c. 15. and 6 A. c. 7¹. the parliament in

(20) 4 inst. 28. Hal. of parl. 38.
sect. 1, 2, 3.

¹ 1 G. II. c. 7.

being

being shall continue for six months after the death of the king or queen, unless sooner prorogued or dissolved by the successor. If it be separated at the time of the king's death, it shall assemble immediately; and if no parliament is then in being, the last one shall assemble, and be again a parliament. 3. A parliament may dissolve by length of time.—By st. 1. G. I^k. the parliament must expire at the end of every seventh year, unless dissolved by the royal prerogative.

^k 7 G. III. c. 3. sect. 1. At the end of eight years to be accounted from the day on which by the writ the parliament is appointed to meet.

C H A P. III.

Of the *King* and his Title.

THE supreme *executive power* of these kingdoms is vested in a single person; King or Queen.

THE crown is by common law and constitutional custom hereditary—in a manner peculiar to itself; for the right of inheritance may from time to time be changed or limited by act of parliament, under which limitation the crown still continues hereditary. It is at present limited by 12 and 13 W. III. c. 2^a. to the heirs of the body of the *Princess Sophia* (who was the granddaughter of James the 1st, by Elizabeth, queen of Bohemia, who was his daughter) *being protestants*.—By 6 Ann. c. 7^b. it is highly penal to doubt the power of the king and parliament, to new model or alter the succession,—and it enacts, that if any person *maliciously, advisedly, and directly*, shall maintain by writing or printing, that they have not power to make laws to bind the

^a Eng. ft.

^b 2 Ann. c. 5. sect. 1.

crown and the descent thereof, shall be guilty of high treason; or if he maintains the same by only preaching, teaching, or advised speaking, he shall incur the penalties of præmunire.

By this limitation it *descended* to her son, G. I. and thence thro' G. II. to his great grandson, our present illustrious monarch, G. III.—25 Oct. 1760.

C H A P.

C H A P. IV.

Of the *King's Royal Family*.

THE *Queen* is the most considerable branch of the king's family :—She is either queen *regent*, and therefore holds the crown in her own right ; as Mary : or, queen *consort* ; who is the wife of the reigning king : or, queen *dowager* ; who is the relict of the last king. She is distinct from the king. She may do many acts of ownership without his consent, as purchasing and conveying (1). She is capable of taking a grant from the king. She has separate courts and officers, not only in matters of ceremony, but law. She has her attorney and solicitor general. She may sue, and be sued alone. She has a right to dispose of her effects by will. She is in all legal proceedings as a *feme sole* (2). She has many prerogatives ;—as not paying toll (3).—But in general when the law has not declared her exempted, she is on the same footing with other subjects. She has some pecu-

(1) 4 Rep. 23.

(2) Co. Litt. 133.—Finch Law 86.

(3) Ibid.

niary advantages, as, an antient perquisite called *aurum regine*,—the tail of all *whales* taken on the coast (4). In point of the security of her life and person, she is on the same footing with the king.—It is by 25 E. III. equally treason to compass or imagine her death:—To defile her, amounts to the same high crime, as well in the person committing the fact, as in her, if consenting.—The *husband* of a queen regnant is her subject; as prince George of Denmark was to queen Anne. A queen dowager enjoys most of the privileges of queen consort, but it is not high treason to conspire her death, or to violate her chastity. No man can marry a queen dowager without special licence from the king, on pain of forfeiting his goods and lands. She, altho' an alien, is entitled to dower (5). She does not lose her regal dignity when she marries a commoner.

By 25 E. III. to conspire the death of the *prince of Wales*; or to violate the chastity of either the queen consort, or princess royal, is high treason.

THE *younger children* are little more regarded by the laws than to give them pre-

(4) Brañon. l. 3. c. 3.

(5) Co. Litt. 31.

cedence.

cedence.—By 31 H. VIII. c. 10. no person, except the king's children, shall sit at the side of the cloth of estate in the parliament chamber.—And that certain officers shall precede, all dukes, except such as shall be the king's son, brother, uncle, nephew, grandson, or brother or sister's son. The care of all the king's grandchildren, while minors, and of their marriages, belongs to the king, even during their father's life (6).

(6) Fortesc. al 401, 440.

C H A P. V.

Of the Councils belonging to the King.

OF these, the first is the high court of parliament, of which we treated in ch. 2. of this book.

2d, THE *peers* are by birth hereditary counsellors of the crown, and may be convened during the sitting of parliament, or when there is none in being,—and they have a right to demand individually an audience to lay before the king such matters as they may judge of importance for the public.

3d, THE judges of the courts of law.

4th, THE *privy council*.—The king names the members at his will, and they are subject to his removal at pleasure. They are to advise him according to the best of their cunning and discretion, for his honour and the good of the public, without partiality.—To keep his councils secret.—To avoid corruption.—To help and strengthen the execution of what shall be there resolved.—To withstand all persons who would attempt

tempt the contrary; and to observe, keep and do all that a good counsellor ought.— Their power is to enquire of all offences against government, and to commit the offenders to take their trial. In admiralty and plantation causes, and in matters of lunacy and idiotcy, the privy council have cognizance as a court of appeal. If a question arises between two provinces concerning the extent of their charter, and the like, the king exercises original jurisdiction therein;—so if any person claims an island or province. From all dominions of the crown (except Great Britain and Ireland) an appeal lies to this council, who hear the allegations and proofs, and report it to his majesty, by whom final judgment is given.—By 12 and 13 W. III. c. 2^a. no person born out of the dominions of the crown, unless born of English parents, even tho' naturalized, shall be capable of being a privy counsellor.—By 3 H. VII. c. 14. if any of the king's servants of his household conspire or imagine to take away the life of a privy counsellor, it is felony^b.—By 9 Ann. c. 16. any person that shall unlawfully at-

^a Brit. stat. 13 G. II. c. 7. sect. 6—10.

^b Eng. stat. 3 H. VII. c. 14. It shall be tried before the steward, treasurer, and comptroller, or two of them, by a jury of twelve of the household.

tempt

tempt to kill, or shall unlawfully assault and strike, or wound any privy counsellor in the execution of his office, shall be felons, and suffer death. Its dissolution depends on the king's pleasure; but, by 6 Ann. c. 7^e. no privy council in being shall be dissolved by the demise of the crown, till six months after (unless sooner determined by the successor.

£ Brit. stat. 6 Ann. c. 7. sect. 8.

CHAP.

C H A P. VI.

Of the King's *Duties*.

HIS principal duty is to govern his people according to law. By 12 and 13 W. III. c. 2^a. it is declared, that the laws of England are the birth-right of the people thereof.—That all the kings and queens 'ought to administer the government of the same, according to the said laws.—That all their officers and ministers ought to serve them respectively, according to the same. And therefore all the laws for securing the established religion, and the rights and properties of the people are thereby ratified and confirmed.

By 1 W. and M. c. 6^b. the *coronation oath* is couched in these words ;—“ Will you
 “ promise and swear to govern the people
 “ of this kingdom, and the dominions there-
 “ unto belonging, according to the statutes in
 “ parliament agreed on, and the laws and
 “ customs of the same ?—Will you, to your
 “ power, cause law and justice, in mercy,

^a See note (e), chap. 1. of this volume.

^b English stat.

“ to

“ to be executed in all your judgments?—
 “ Will you, to the utmost of your power,
 “ maintain the laws of God, the true pro-
 “ fession of the gospel, and the protestant
 “ reformed religion, established by the law?
 “ —And will you preserve unto the bishops
 “ and the clergy of this realm, and the churches
 “ committed to their charge, all such
 “ rights and privileges as by law do, or shall
 “ appertain unto them, or any of them?”
 To which the king or queen, laying his
 or her hand on the holy gospels, shall say,
 The things which I have here before prom-
 ised, I will perform and keep:—So help
 me God—and shall kiss the book.

EVERY king, at his accession, shall take
 an oath, and subscribe to it, to preserve the
 protestant religion and presbyterian church
 government, in Scotland. And at his co-
 ration, shall take and subscribe a simi-
 lar oath, to preserve the settlement of the
 church of England, within England, Ire-
 land, Wales and Berwick, and the territo-
 ries thereunto belonging.

C H A P. VII.

Of the King's *Prerogative*.

THESE are either *direct*, or incidental: The direct, are such positive parts of the royal character and authority, as are rooted in, and spring from his political person—as the right of sending ambassadors, making peace and war, and the like.

THOSE that are incidental bear a relation to something else, distinct from ~~his~~ his person; such as, that no costs shall be recovered against him.

HIS direct prerogatives may be divided into three kinds: his royal character; his royal authority; his royal income.

As to his character, or *dignity*^a. He has the attribute of *sovereignty*, or pre-eminence. Hence no suit or action can be brought against him in civil matters,—no court having jurisdiction over him (1). Hence his person is sacred, tho' the measures pursued in his reign are tyrannical; yet in private

^a 33 H. VIII. c. 1. sect. 1.

(1) 1 Finch. l. 83.

concerns

concerns he is to be petitioned in his court of chancery, where the chancellor will administer right, as matter of grace, not compulsion (2). In cases of ordinary *public oppression*, the constitution has provided, by means of indictments and parliamentary impeachments, that none shall assist the crown in contradiction to the laws of the land. In cases of extraordinary public oppression, which may happen to spring from any branch of the sovereign power, and which are out of stated rules, or express legal provision, the necessities of the times must find new remedies. *He* has also the attribute of *perfection*; he *can do no wrong*; his ministers alone are answerable for any act done by administration: he is also incapable of thinking wrong. If the crown should *grant* any franchise or privilege *contrary to reason*, or prejudicial to the commonwealth, or to a private person, it is rendered void. In the king is no negligence or lapse, and therefore no delay will bar his right,—*nullum tempus occurrit regi* (3). In him can be no stain or corruption of blood. If the heir was attainted of treason or felony, and afterward the crown should descend to him, this would purge it *ipso facto* (4); as was the case with H. VII. He

(2) Finch, 255.

(3) Ibid. 82. Co. Litt. 90.

(4) Finch, l. 82.

can never be a *minor*; and therefore his royal grants and assents are good, tho' he has not attained the age of twenty-one years; yet it is usual to appoint a protector or *guardian* for a limited time, as is now, by 5 G. III. c. 2. 7. *He has* the attribute of *perpetuity*. Immediately on the decease of the reigning prince, his imperial dignity is at once vested in his heir, who is *eo instanti*, king.

As to his authorities and *powers*; in the exertion whereof, consists the executive part of government. He has the sole power of sending and receiving *ambassadors* to and from foreign courts. These persons are *protected* from punishment for any crime they may commit; but if they grossly offend, they may be sent home, and accused before their master; as was Count Gyllenberg, the Swedish minister to Great Britain, 1716. By 7 Ann. c. 12. all process whereby the person of any ambassador, or his domestic servant shall be arrested, or his goods distreined and seized, shall be null and void; and the persons prosecuting, soliciting, or executing such process, shall be deemed violaters of the law of nations, and disturbers of the public peace, and shall suffer such punishment as the lord chancellor and the two chief justices, or any
two

two of them shall think fit. But no tradesman within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be protected by this act.—Nor shall any one be punished for arresting his servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex.

It is the king's prerogative to make *treaties, leagues, and alliances*. Whatever contract he engages in, no power in the kingdom can legally delay, resist, or annul. But a parliamentary impeachment for the punishment of such ministers as advised such treaties from criminal motives, may take place.

He has also the sole *power of making peace or war*:—So that to make a war completely effectual, it is in England, to be publicly declared by the king's proclamation. And here again the check of parliamentary impeachment is preserved against the ministers and advisers, of a wanton or injurious exertion of this prerogative. But before war is declared, the ministers of the crown may issue *letters of marque and reprisal* on due demand. They are granted when the subjects of one state are injured by those of another,

another, and justice is denied. They are to seize the bodies and goods of the subjects of the offending state until satisfaction be made.—By 4 H. V. c. 7. the form is directed,—that the sufferer must first apply to the lord privy seal; and he shall make out letters of request under that seal. If after such request, the party do not make within convenient time, due satisfaction to the party grieved, the lord chancellor shall make out letters of marque under the great seal, by virtue of which he may attach and seize the property of the aggressor nation, without being condemned as a robber or pirate.—The prerogative of safe conduct, without which no member of one society has a right to intrude into another. No subject of a nation at war with us can come into the realm, nor can travel on the high seas, or send his goods from place to place, without danger of being seized by us, unless he has letters of *safe conduct*, which are granted under the great seal and inrolled in chancery. *Passports* under the king's sign manual or licences from ambassadors are of equal validity. By magna charta all merchants shall have safe conduct to come into, depart from, or tarry in this kingdom for the exercise of merchandize, without any unreasonable imposts, except in time of war. And if war breaks out between their country and
ours,

ours, they shall be attached without harm of body or goods, till the king or his chief justiciary shall be informed how our merchants are treated in their country—if ours are secure, so shall theirs.

THE king is a constituent part of the legislative power; he has a right to reject such provisions in parliament as he judges improper; he is not bound by any *act* unless specially named;—yet where an *act* is made to preserve public rights and suppress public wrongs, and does not interfere with the established rights of the crown, it is binding as well on the king as the subject (5). The king may take the benefit of any particular *act* though he be not specially named (6).

THE king is *generalissimo* or *first in military command* in the kingdom; he has the sole right of raising *fleets* and *armies*. By 13 C. II. c. 6. he has the prerogative of appointing *ports* and *havens* for the exclusive landing and loading merchandize—but he could not narrow nor confine their limits when once established. By 1 E. c. 11. and 13 and 14 C. II. c. 11. sect. 14. he may assign proper *wharfs* and *quays* in each port for exclusive landing and loading.

(5) 11 Rep. 71.

(6) 7 Rep. 32.

THE erection of *beacons*, *light-houses*, and *sea-marks*, are branches of the prerogative:—he has the exclusive power, by commission under the great seal (7), to cause them to be erected in fit places (8), as well on the lands of the subject as of the crown, which power is usually vested by letters patent in the lord high admiral (9). By 8 E. c. 13. the corporation of Trinity house may erect beacons or sea-marks where they think proper; and if the owner of the land, or other person shall destroy them, or shall take down any steeple, tree, or ^b known sea-mark, he shall forfeit one hundred pounds, and in case of inability to pay it, be outlawed *pro facto*.

By 12 C. II. c. 4. and 29 G. II. c. 16. he has the prerogative of prohibiting the exportation of *arms* or *ammunition* under severe penalties.

HE has also a right, when he sees proper, of *confining* his subjects to stay within the *kingdom*, or when abroad, to command *their return* (10).

(7) 3 Inst. 204. 4 Inst. 148.
M. 42.—Prynne on 4 Inst. 136.
1 Sid. 158.
P. c. 22.

(8) Rot. claus. 1 R. 2.
(9) 4 Inst. 149.
3 G. III. c. 15. sect. 4. Felony
(10) 1 Hawk.

HE is the *fountain of justice* and general conservator of the peace; he has therefore the right of *erecting courts* of justice. By 1 G. III. c. 23^e. the *judges* are continued in their office during good behaviour, notwithstanding the demise of the crown,—and their full salaries are secured to them, during the continuance of their commissions. In all legal proceedings the king is supposed to be in court, and therefore does not appear by attorney as other men do (11).

THE power of *proclamations* is vested in the king alone. They have a binding force when they are grounded on, and enforce the law of the land (12); but they are not binding where they contradict the old laws, or establish new ones. It is thus, an established law, that the king may prohibit any of his subjects from leaving the kingdom;—a proclamation, therefore, forbidding this in general, by laying an *embargo* on all shipping in time of war, will be equal as an act of parliament (13). But a proclamation laying an embargo on all vessels laden with wheat (tho' in a general scarcity) is contrary to law, and particularly to 22 C. II. c. 13.

* In Ireland the judges hold their seats *durante bene placito*. (11) Finch, l. 81. (12) 3 Inst. 162. (13) 4 Mod. 177—179.

THE king is likewise *the fountain of honour*. He has the sole power of conferring dignities and honours. He has the prerogative of *erecting and disposing of offices*; but he cannot annex new fees to them, nor annex new fees to old offices. This would be a tax on the subject, which cannot be imposed but by parliament (14). He has also the prerogative of conferring *privileges on private persons*,—as granting precedence to any subject (15), making an alien, a denizen, and the like.

HE is the *arbiter of commerce*. He has the establishment of public *marts* and *fairs*, with the tolls annexed thereto. He has the regulations of *weights and measures*^a. He can give authority to, or make current all *monies*. He has the prerogative of *coining*, with respect of which, there are three things to be considered,—the materials, the impression, the denomination. It must be of gold or silver (16). Copper halfpence and farthings were first coined in 1672, and made current by proclamation in all payments under sixpence: But they are not on the same footing as the former, particularly with regard to the offence of counter-

(14) 2 Inst. 533. (15) 4 Inst. 36. ^a 7 W. III. c. 24. sect. 1.—10 W. III. c. 2. sect. 3. regulates their standard. (16) 2 Inst. 577.

feiting them. The impression or stamping thereof is a prerogative. The denomination is also in the breast of the king. If any unusual pieces are coined, the value must be ascertained by proclamation. He may legitimate foreign coin, and make it current here—declaring at what value it shall be taken in payment (17). He may also cry down any coin of the kingdom, and make it no longer current (18).

HE is the *head of the church*, both by 26 H. VIII. c. 1. and 1 El. c. 1°. He convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical *synods*. By 25 H. VIII. c. 19^f. his royal assent is actually necessary to the validity of every canon. By the same statute, he has the appointment to all vacant bishopricks, and other certain ecclesiastical preferments. He is likewise the dernier resort in all ecclesiastical causes, an appeal lying ultimately to him in chancery from the sentence of every ecclesiastical judge, by the same stat. 25 H. VIII. c. 19^g.

(17) 1 Hale, p. c. 197. (18) Ibid. * 28 H. VIII.
c. 5.—2 El. c. 1. sect. 17. c. 2. sect. 6. † 28 H. VIII.
c. 5. revived by 2 El. c. 1. sect. 17. ‡ 28 H. VIII.
c. 5. sect. 3.

C H A P. VIII.

Of the King's *Revenue*.

THE revenues of the crown are either *ordinary* or *extraordinary*. The former are such as have existed time out of mind in the crown; or else have been granted by parliament in exchange for such as were inconvenient to the subject.

THE first of the ordinary revenues is the *custody* of the *temporalities* of a bishop, which on the vacancy of a bishoprick, are immediately vested in the king^a. But at present the new bishop receives his temporalities *untouched* by the king, and may maintain an action for the profits (1).

THE king is entitled to a *corody* out of every bishoprick; which is to send one of his chaplains, to be maintained by the bishop, or have a pension until he is promoted to a living (2). It is now fallen into disuse.

^a And so likewise, in case of contempt.—Stamf. præ —
54. (1) Co. Litt. 67, 341. (2) F. N. B. 230.

He has all the tithes of *extra-parochial* places (3), on the confidence, to distribute them for the good of the clergy. He has the *first fruits* and *tenths* of all spiritual preferments. They are the first year's profits of a living, according to a value made and confirmed by 1 E. c. 4^b; and the tenths of the annual profits of each living, by the said valuation. By that statute, all vicarages under ^s ten pounds a year, and all rectories under ten marks, are discharged from first fruits. If in such livings as are chargeable, the incumbent lives but half a year, he pays a quarter of the first fruits; if but a year, then half; if a year and a half, three quarters; if two years, the whole^d. By 27 H. VIII. c. 8. no tenths are to be paid the first year. By 5 and 6 Ann. if a benefice be under fifty pounds per ann. clear value, it shall be discharged of first fruits and tenths. By 2 Ann. c. 11^e. the
revenue

(3) 2 Inst. 647. ^a By 28 H. VIII. c. 8. revived by 2 E. c. 3. first fruits, which are the first year's profit of a living, and the twentieth part of the annual value thereof, were vested in the crown. ^c 2 E. c. 3. sect. 5. Vicarages, not exceeding six pounds, thirteen shillings, and four pence, and parsonages not exceeding five pounds. ^d 2 G. I. c. 15. sect. 4. Four years allowed to pay it, by installments. ^e By two separate letters patent of queen Anne, dated 7 Feb. 1711, the first fruits and twentieth parts are granted to trustees and their successors for
ever,

revenue of first fruits and tenths are vested in trustees for ever, to form a fund for the *augmentation* of poor livings, which is called *Queen Anne's bounty*,

HE has the rents and profits of the *demesne lands* of the crown^f. These are al-

ever, as a fund for repairing churches and increasing the value of small benefices. And those letters patent were afterwards confirmed in parliament, by 2 G. I. c. 15: sect. 1.

^f These arise on lands which are the antient inheritance of the crown,—upon the grants of the lands, &c. which belonged to religious persons, and which were wrested from them, by 28 H. VIII. c. 16. and 33 H. VIII. c. 5.—from the rents reserved in grants of fairs, markets, fisheries and ferries;—and by the rents, reserved by the crown, on the distribution of the lands of the six forfeited counties of Donegal, Tyrone, Fermanagh, Derry, Armagh and Cavan. They also arise from port corn rent, composition rent and quit rent.

1. Port corn rent (so called *quia ad portam monasterii jacebatur*); which originally was paid by tenants to monasteries; and now by letters patent, dated 20. April, 1763, are vested in the commissioners of the revenue, for the use of the crown. Composition-rent, which was reserved by treaty entered into between the inhabitants of Connaught and part of Munster, and king James I. by letters patent of king James I. dated the 21st of July, 1615, on condition of their being freed from all uncertain cesses. Quit-rent, is an acreable rent, differing in each province, and reserved to the crown upon the forfeited estates, by 14 and 15 C. II. c. 2. sect. 3, 4. at the time they were parcelled out to the innocent sufferers, to the transplantees, or to the soldiery. In Leinster it amounts to three pence; in Munster, to two pence farthing; in Ulster, to two pence; and in Connaught, to three half-pence per acre. All these species of rents yield to the crown about sixty-seven thousand and forty pounds.

most

most granted away to the subject. But now, by 1 Ann. c. 7. no leases or grants from the crown can be for more than thirty one years, or three lives, except of houses for fifty years. And no reversionary lease can be made to exceed (with the estate in being) three lives, or thirty one years.—The tenant must be liable to an action for waste,—the usual rent must be reserved, or where there has been no rent then, one third of the clear yearly value.

HE has an *hereditary excise* of one shilling and three pence a barrel on all beer and ale sold in the kingdom^s, in lieu of the military tenures and purveyance which king Charles II. resigned.

HE has also, by 30 G. II. c. 19. seven thousand pounds per annum, issuing out of new stamp duties, imposed on *wine licences*,

^s By 14 and 15 C. 2. c. 8. there is an hereditary duty of two shillings and six pence for every thirty-two gallons of ale and beer of above six shillings per barrel, and of six pence for the same quantity at or under six shillings per barrel, brewed for sale; and four pence upon every gallon of strong waters, distilled for sale. Besides which, by 17 and 18 G. III. c. 1. sect. 2. there has been additional duties imposed, of two shillings on every thirty-two gallons of ale or beer of above six shillings per barrel; and four pence on the like quantity, if at or under six shillings per barrel; and for every gallon of strong waters four pence.

in

in lieu of a rent payable to the crown by persons licensed to sell wine by retail, which was abolished by that statute ^h.

HE has the profits arising from *forests*.

HE has the profits arising from the ordinary *courts of justice*;—as fines, forfeitures, setting the great seal to charters. These have been almost all granted out to the subjectsⁱ. But by 1 Ann. c. 7. any future grant shall only continue for the life of the prince who grants them.

HE has the right to *royal fish* (which are *whale* and *sturgeon*) when taken on the coast, or near the shore (4).

^h By 14 and 15 C. II. c. 18. sect. 2. no person shall sell beer or ale by retail without licence, for which there shall be paid twenty shillings a year.—And by 17 and 18 C. II. c. 19. all persons selling wines or strong waters by retail, are required to have a licence, for which they shall pay (if for wine) such sum as may be agreed on, not under forty shillings, or more than forty pounds in the city or county of the city of Dublin, or more than twenty pounds in any other part of the kingdom. (And if for strong waters) not under forty shillings, nor more than five pounds in any part of the kingdom, except in the city, or within four miles of the tholfel of the city of Dublin; where, by 3 G. III. c. 27. they must pay a sum not less than four pounds, or more than ten pounds yearly.

ⁱ A moiety of this branch of the revenue is granted to the lord chancellor to enable him to support the dignity of his office.

(4) 3 Plowd. 315.

HE

HE has the right to *shipwrecks*. By West. 1. 3 Ed. I. c. 4. if any thing (as a dog) escape alive, it is not a legal wreck (5); but the sheriff of the county is bound to keep the goods a year and a day; that if any one can prove his property in his own right, or by representation (6), they may be restored. If the goods are perishable, the sheriff shall sell them, and the money remain in his hands (7). This franchise is usually granted to lords of manors. And if any, is so entitled to wrecks on his own land, yet the king's goods, if wrecked, may be claimed after a year and a day (8). To make a wreck; the goods must come to land, if they continue at sea, they are called *jetsam*, as where goods are cast into the sea, and remain under water; *flotsam*, as where they float on the water; *ligan*, as where they are sunk, but tied to a buoy, in order to be found again (9): These are the king's, if no owner appears. By the king's grant of wrecks, these may not pass (10). By 2 Ed. III. c. 17^k. if any goods be cast on shore (so as they be not a wreck) they shall be delivered to the owners,

(5) Spel. cod. apud Wilkins 305. 2 inst. 167. Flet. 1 i. c. 44. (6) 2 Inst. 168. (7) Plowd. 166. (8) 2 Inst. 168. Bro. abr. Titt. wreck. (9) 5 Rep. 106. (10) 5 Rep. 108. ^k 4 G. I. c. 3. sect. 2. made per. by 11 G. II. c. 9.

on paying a reasonable reward to those who preserved them, called *salvage*. By 12 An. stat. 2. c. 18. and 4 G. I. c. 12¹. all head-officers, and others, of towns near the sea, shall, on application made to them, summon as many hands as necessary, and send them to the relief of any ship in distress, on forfeiture of one hundred pounds; and in case of assistance given, salvage shall be paid, to be assisted by three neighbouring justices. All persons that secrete any goods shall forfeit treble value; and if they *willingly do any act* whereby the ship is lost, by making holes in her, or otherwise, they are guilty of felony, without the benefit of clergy. By 26 G. II. c. 19^m. *plundering* any vessel, either in distress or wrecked, and whether any living creature be in her or not, such plundering, or preventing any person that endeavours to save his life, or by putting out false lights to bring any vessel

¹ 11 G. II. c. 9. sect. 1, 2, 3, 4, 5, 6. ^m Ibid. sect. 4, 5, 6. 15 and 16 G. III. c. 33. sect. 1, 2. 14 G. I. c. 4. sect. 3, 4, 5, 6. and by 15 and 16 G. III. c. 33. sect. 1, 2. all persons who shall have any of the tackle, furniture, &c. of any ship in distress, stranded, or wrecked, in their custody, and shall not within three days give notice thereof to a justice of the peace, they shall suffer imprisonment, not exceeding six months; and the persons having the same, and not delivering them up within forty-eight hours after demand made, shall be deemed to have stolen them, and shall be guilty of felony.

into

into danger, are capital felonies. Pilfering any goods cast on shore, is petit larceny.

THE king has a right to *mines*. By 1 W. and M. c. 30. and 5 W. and M. c. 6^a. no mines of copper, tin, iron, lead, tho' gold or silver may be extracted from them, shall be deemed royal mines. But the king, or the persons claiming under him, may have the ore, by paying a price stated in the act.—So the mines which belong to the king are only of gold and silver (11).

HE has the revenue of *treasure-trove*^o; which is where money, gold, silver, plate, or bullion is found hidden *in* the earth, or other private place, the owner being unknown. It is the hiding, not the abandoning it, that gives the king a property.—The punishment for *concealing* from the king, the finding of treasure-trove, is fine and imprisonment (12).

HE has the right of *waifs*^p; which are goods stolen, and thrown away by the thief, for fear of being apprehended^q. But if the party robbed, immediately pursues and apprehends the thief, or convicts him, or pro-

^a 4 Ann. c. 12. sect. 2.

(11) 2 Inst. 577.

• This revenue belongs to the crown of Ireland.

(12) 3 Inst. 133

^p Ibid.

^q 5 Co. 109.

cures evidence to convict him, he shall have his goods again (13). These goods do not become the property of the king, unless seized by somebody for his use (14). If the goods are hid by the thief, and not thrown away, they are not waifs (15); neither can the goods of a foreign merchant (16).

HE has the right of *estrays*; which are such valuable animals as are found wandering in any manor, and no man knoweth the owner: but now by grant they mostly belong to the lord of the manor. To vest a property in them, they must be proclaimed in the church and two market-towns next the place where they are found. If they are not claimed after such proclamation, and *a year and a day* passeth, they belong to the king or his substitute (17), even tho' the owner is a minor, or under any legal incapacity (18). If the owner claims them, he must pay for finding, keeping and proclaiming (19). If they again stray before the year and day, the lord can't reclaim them; but they belong to the new lord (20). Any beast may be an estray that is tame

(13) Finch, l. 212. (14) Ibid. (15) 5 Rep. 109.
 (16) Fitz. abri. tit. estray 1—3 Bulstr. 19. ' This
 revenue subsists in Ireland. (17) Mir. c. 3. sect. 19.
 (18) Bro. abri. tit. estrays.—5 Rep. 108.—Cro. Eliz. 716.
 (19) Dalton. Sher. 79. (20) Finch, l. 177.

by nature, and in which there is a valuable property. Swans, but no other fowl may be an estray (21). If it be used until the time is expired, the Lord is liable to an action (22).—But a cow may be milked, or the like (23).

HE has the *forfeiture* of lands and goods for offences ; of which we shall treat hereafter ; and now observe only one species, which is a *deodand* ; or a personal chattel, that is the immediate occasion of the death of any reasonable creature'. If an infant fall from a cart, a horse, or the like, not being in motion, it is no deodand (24) ; but otherwise, if an adult person falls. But if a horse, or other animal, of his own motion, killeth an infant or adult person, or a cart runneth over him, it is a deodand (25). Where a thing is not in motion, only that part (as the wheel of a cart) which is the cause of the death, is forfeited (26), but every thing about it is forfeited, if in motion (27).—It matters not whether the owner was concerned or not. If a man kills another with

(21) 7 Rep. 17. (22) Cro. Jac. 147. (23) Ibid.
 148.—Noy. 119. * This revenue also exists in Ire-
 land. † 1 Hale, 419. (24) 1 Hale, p. c. 422. 3
 inst. 57. (25) Bracton. l. 3. c. 5. (26) 1 Hale,
 p. c. 422. (27) 1 Hawk. p. c. 26.

my sword, it is forfeited (28). Therefore, in all indictments for homicide, the instrument and value are presented by the grand jury, that the king may have the deodand; for it is not one, unless presented by a jury of twelve men (29). It is been held, that if a man fall from a boat or a ship in fresh water, and is drowned, the ship and cargo are deodand (30).

HE has the rights of *escheats* *; which happen on the defect of heirs to succeed to the inheritance.

HE has the custody of *idiots* †, by 17 Ed. II. c. 9. which declares, that the king

(28) Dr. and stud. d. 2. c. 51. (29) 3 Inst. 57.

‡ It is held that this cannot be enquired of by a grand jury secretly at assizes—4 Bur. 19. (30) 3 Inst. 58.—1 Hale, p. c. 423. Molloy de jure maritim 2. 225.

¶ This is also a branch of the Irish revenue, and is the determination of a tenure, either *propter defectum sanguinis*, or *propter delictum tenentis*. When this happens on any lands of which the crown hath the inheritance, they continue for ever vested in it. Whereas, if they are the inheritance of any other person, the right of forfeiture (which existed before the introduction of the feudal tenure) vests the land in the crown (in case of treason) for ever; and in case of felony, for a year and a day; after which they escheat to the lord.

* The custody of idiots and lunatics is vested in the crown, but their estates cannot be seized to its use, until inquisition of office found. 4 Co. 54.

shall

shall have the custody of the lands of natural fools (31). A man born *deaf, dumb* and *blind*, is an idiot (32).

HE has also the *custody* of *lunatics*, but only as trustee to account with the unfortunate person if he recovers; and if not, with his representatives.—To prove a man a lunatic or idiot—the chancellor (to whom the king hath intrusted them) (33) on petition or information grants a commission in nature of a writ *de idiota inquirendo*, to enquire into the person's state of mind, and if he be found a lunatic, he usually commits the care of his person, with a suitable allowance for his maintenance to some friend, called his *committee*, which is seldom the next heir;—the heir is generally made the committee of the estate—accountable to the court of chancery, and to the lunatic if he recovers; if not, to his administrators.

THESE ^y *ordinary revenues* are by the former prodigality of the crown, mostly granted

(31) 4 Rep. 126.

(32) F. N. B. 232.

(33) 3 P. Wms. 108.

^y Here may be observed a revenue which belonged to the crown, on all faculties and dispensations, appointed by 28 H. VIII. c. 19. But it was granted away; the one moiety by James I, to the archbishop of Armagh and his successors; the other by 1 G. II. to the judge of the prerogative court, to support the dignity of the office, at a time that no salary was annexed to it.

away

away to subjects, which occasions the necessity of supporting its dignity by *extraordinary revenues*, which are usually called by the synonymous names of *aids*, *subsidies*, and *supplies*, and are granted by the commons in parliament.

THESE are annual, or perpetual.—The usual annual ones are those on land and malt.

THE *land-tax* is generally supposed to be first introduced by W. III. in 1692, but it has been used long before under the names of scutages, talliages, and others.—A supply of five hundred thousand pounds is equal to one shilling in the pound, of the value by which lands are now and have been since 1693 estimated; during which time it has been occasionally at two, three, and four shillings a pound, but at a medium three shillings and three pence a pound.—It is raised by charging a particular sum on each county, and is assessed and raised on individuals by commissioners appointed, who are the principal land-holders.

THE *malt-tax* is a sum of seven hundred and fifty thousand pounds per annum, raised by a duty of nine pence a bushell on malt,
and

and a proportionable sum on cyder * and perry.

THE perpetual taxes are, 1st. * The *customs*, payable on *merchandizes* exported or imported, and first granted by 3 E. I. Tonnage and poundage being a part of the hereditary customs are by 9 An. c. 6. 1 G. I. c. 12. and 3 G. I. c. 7. mortgaged for the debt of the public. ^b *Aliens* pay a larger proportion than natural subjects, which is called the *aliens duty*.

* By 17 and 18 G. III. c. 2. sect. 9, 10. No cyder shall be sold by retail without a licence, for which there shall be paid one shilling and one penny; and cyder so sold shall pay a duty of one penny per gallon.

* All merchandizes imported and exported are liable to the duties of tonnage and poundage. The former is a duty imposed by 14 and 15 C. II. c. 9. on all wines and oils imported, according to the rates affixed to the several kinds thereof, by the said statute, deducting therefrom by the seventh rule in the act, an allowance of ten pounds per cent. for leakage, in case the wines, &c. have not been filled up on board. Poundage is a duty granted to the crown in the 10 of H. VII. on all merchandizes imported or exported for sale (except wines and oils.)

^b By 14 and 15 C. II. c. 9. aliens pay an additional duty of twelve pence in the pound on all commodities, or the manufacture of any commodities of the realm, which they shall export. The sums payable as poundage on the several articles subject thereto, are contained in a book of rates annexed to the 14 and 15 C. II. c. 9. But by the eighth rule in said statute, there is an allowance on all goods imported of five per cent.

2nd. * The *excise* duty, which is an inland imposition laid on sundry articles, and payable sometimes on the consumption, or frequently on the retail sale.

3d. A *duty on salt*, consisting of an excise of three shillings and four pence a bushel imposed thereon ;—it is not generally called an excise, because under the direction of different commissioners ;—it is made perpetual by 26 G. II. c. 3.

4th. * THE *post-office duty*, created by parliament, in 1643.

* The *impost excise* is a duty granted on all merchandizes imported, according to the book of rates annexed to 14 and 15 C. II. c. 8. There is an allowance from this duty made to the wholesale importer, for prompt payment, of ten per cent. on wines and tobaccos ; and of six per cent. on all other commodities. Besides these perpetual duties on merchandizes, &c. there have been additional duties laid on sundry articles, by 17 and 18 G. II. c. 1. until the 25th of Decem. 1779. *Prisage* is a duty payable to the crown, and is a certain quantity of wine taken from every ship for its use, according to the number of tons contained therein. There is also a custom of fifteen shillings per tun, payable on *prisage* wine, over and above the *prisage* abovementioned. The king's butler has a duty of *prisage*, for which the crown pays at this day four thousand pounds per annum, by agreement entered into between G. II. and the earl of Arran (in whom this right was vested).

* By Brit. stat. 9 Ann. c. 10. made perpetual : by 3 G. I. c. 7. this duty is extended to Ireland.

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5th. : *Stamp-duties*, which is a tax imposed on all parchment or paper, whereon all legal proceedings or private instruments of almost any nature are written.—Their first institution was by 5 and 6 W. and M. c. 21.

6th. A *duty on houses and windows*, which is a tax of three shilling per house; and a tax on all windows above six in such house.

7th. † THE duty arising from licences to *hackney coaches and chaises*.

8th. ‡ A DUTY on *offices and pensions*, consisting of a tax of one shilling per pound (over

* This duty was introduced here, by 13 and 14 G. III. now continued by 17 and 18 G. III. c. 3. until the 25th of December, 1779.

† By 17 and 18 G. III. c. 1. there is a duty laid on all carriages, according to the rates thereby established until the 25th of December, 1779.

‡ By 17 and 18 G. III. c. 2. sect. 19. all persons who shall hold or receive any salary, office, &c. until the 25th of December, 1779, and shall not reside in the kingdom for at least six months in the year, are obliged to pay at the rate of four shillings in the pound out of such salaries, &c. except the persons therein excepted. Thus far the analogy of the revenue between England and this kingdom hath been followed; and there yet remain some duties to be mentioned, that do not fall under any head set out by Sir W. Blackstone. The light-house duty, which is a tax of four pence per ton, payable by all foreign ships trading

(over and above all other duties) out of all salaries, fees, and perquisites of offices and pensions, payable by the crown, by 31 G. II. c. 22.

THE

trading here, and amounts to about five hundred pounds per annum. The hearth-money, which is a duty of two shillings imposed by 14 and 15 C. II. c. 17. sect. 1. on every hearth in each house, except of widows, who obtain a certificate from the minister and two justices, that the house they rent is not of above eight shillings yearly value; and that they are not worth four pounds in the whole of their property.—This duty produces about sixty thousand pounds per annum. By 3 G. II. c. 3. sect. 30. continued by 17 and 18 G. III. c. 16. sect. 1. for seven years, from the 25th of March, 1779, there is a duty of six pence per ounce, Troy, laid on all gold and silver imported or manufactured in the kingdom.—And by 17 and 18 G. III. c. 42. sect. 3. there is an additional duty on all gold and silver plate, wrought in this kingdom, of six pence per ounce, Troy weight.—By 3 G. II. c. 2. sect. 14. continued by 17 and 18 G. III. c. 16. sect. 1. for seven years, from the 25th of March, 1779, there is a duty on all cards made in the kingdom, of six pence per pack; and on every pack imported, twelve pence; and on every pair of dice, five shillings.—And by 17 and 18 G. III. c. 2. sect. 7. there is an additional duty of six pence per pack on all cards manufactured and sold until the 25th of December, 1779. By 17 and 18 G. III. c. 6. sect. 1. all hawkers and pedlars who shall travel on foot, shall pay a duty of twenty shillings per annum; and every such person travelling with a horse, &c. carrying burden, shall pay an additional duty of twenty shillings for every horse, &c. until the 25th of March, 1780. The crown hath also a moiety of all goods seized for not paying the customs, appointed by these several acts; and a moiety of the fines

THE amount of these several branches of the revenue, neat clear produce, is about seven millions and a quarter annually, besides more than two millions and a quarter raised by land and malt-tax. All which are, in the first place, appropriated to the payment of the *national debt*. All the extraordinary revenues, except the annual land and malt-tax, are mortgaged to pay the interest of the national debt, and made perpetual. The whole next stands mortgaged to raise an annual sum of eight hundred thousand pounds per annum, to support his majesty's household, in lieu of the hereditary revenues of the crown; which by his present majesty were given for the service of the public. The remainder goes into a *sinking fund*, appropriated to pay off the national debt. The neat produce, clear of all deductions, raised yearly, amounts to near ten millions sterling.

imposed for a breach of them. All the hereditary duties are liable to be charged or aliened by the crown, except the crown rents, quit rents, and chief rents, by Eng. stat. 11 W. III.—the revenue of ale licences, by 14 and 15 C. II. c. 18.—and the hearth-money, by 14 and 15 C. II. c. 17. The additional duties are granted for the support of the crown, unless appropriated for any special purpose named in the act by which they are created.

C H A P. IX.

Of subordinate Magistrates.

1st. **A** *Sheriff*, who does all the king's business in the county. By 14 Ed. III. c. 7. 23 H. VI. c. 8. and 21 H. VIII. c. 20^a. the chancellor, treasurer, president of the king's council, chief justices and chief baron, meet in the exchequer chamber, on the morrow of all souls (now altered to the morrow of St. Martin) and there propose three persons to the king, who appoints one of them to be sheriff. It is to be here observed, that it is now the twelve judges, with the other great officers that meet for this purpose, and not the particular persons above-named. The office is determined by the appointment of the successor (1). By 1 An. st. 1. c. 8^b. he, as well as all other officers, hold their employment for six months after the death of the king, unless sooner displaced by the successor. By 1 R. II. c. 11.

^a For counties, the sheriff returns the names of three persons fit for the office, out of which the chief governor chuses one. The sheriffs of cities are appointed according to particular customs and charters.

(1) Dalt. of sher. 7, 8. ^b Brit. stat. 6 A. c. 7. sect. 8.

no man who has served as sheriff can be compelled to serve again within three years. In his judicial capacity he is to hear and determine all causes of forty shillings value, and under (2). He is to decide the election of knights of the shire (subject to the controul of the house of commons) coroners, and of verderors, and to judges of the qualification of voters. As keeper of the peace he is superior in rank to any man in the county (3). He can call the *posse comitatus* (4), upon which every person above fifteen years old, under the degree of a peer, is bound to attend upon warning (5), under pain of fine and imprisonment, by 2 H. V. c. 3.—Yet tho' keeper of the peace, he with the constable, coroner, and other certain officers, are forbid to try any criminal offence, by magna charta, c. 17.—Neither can he act as an ordinary justice of the peace, by 1 M. ft. 2, c. 8^c. tho' he may apprehend and commit all persons who break the peace, or attempt to break it, and may bind them in recognizance for that purpose. He is bound to execute all processes issuing to him from the king's court. In civil causes he is to arrest on a writ, and

(2) Dalt. c. 4. (3) 1 Rol. rep. 237. (4) Dalt. c. 95. (5) Lamb. Eir. 315. § 7 W. III. c. 13. sect. 3.

take bail. He must summon juries, and see the laws executed, when judgment is passed. He must preserve and levy all the king's rights, as forfeitures, wrecks, &c. unless granted to a subject. He must collect the king's rents within his county, if commanded, by process from the exchequer (6). He has subordinate to him under-sheriffs, bailiffs, and goalers, who must not buy, sell, nor farm their offices, under penalty of five hundred pounds, by 3 G. I. c. 15^d.

THE *under-sheriff* must not continue in office above one year, by 42 Ed. III. c. 9. And if he does, he forfeits two hundred pounds, by 23 H. VI. c. 8. By 1 H. V. c. 4^e. he shall not practise as attorney while he continues in office,

Bailiffs are either of hundreds or special bailiffs. The former are officers of respective districts, appointed by the sheriff, to collect fines, summon juries, attend the judges at assizes, justices at quarter sessions, and execute processes and writs. *Special-bailiffs*, or *bound-bailiffs* (so called, because they give the sheriff security for their con-

(6) Dalton, c. 9.

^d 12 G. I. c. 4. sect. 7. ^e Nor as clerk of the peace, on pain of five hundred pounds, by 11 Anne, c. 8. sect. 7.

duct) are appointed to execute writs, &c. because of their adroitness in seizing their prey.

Goalers are servants of the sheriff, and he is answerable for their conduct. The abuses of goalers and sheriffs-officers to the unfortunate persons in their custody, is well guarded against, by 32 G II. c. 28^f. By 13 and 14 C. II. c. 21. no sheriff shall keep any table at the assize, except for his own family; or give any presents to the judges or their servants; or have more than forty men in livery; yet he may not have less than twenty in England and Wales, under penalty, in any case, of two hundred pounds.

THE *coroner* is an officer chosen by the freeholders in a county, for life; but may be removed by being chosen sheriff or verderor; or being incapacitated by years or sickness; for not having a sufficient estate in the county (7).—If he hath not a sufficient estate to answer any fines that may be set on him, the county shall pay them (8). Ey 25 G. II. c. 29^f. he may be removed

^f 3 G. III. c. 28.

(7) F. N. B. 163, 164,

(8) Mir. c. 1. sect. 3. 2 Inst. 175. * He shall be amerced to twice the amount, and punished at the king's pleasure, by Engl. st. 3. Ed. I. c. 26.

for extortion, neglect, or misbehaviour. His powers are to enquire when any person dies suddenly, or in prison, or is slain, concerning the manner of his death; and this must be *super visum corporis* (9). He must sit at the very place the death happened: and his enquiry is made by a jury from two or three of the neighbouring towns. If any be found guilty, by this inquest, of murder, he is to commit them to prison; and is to enquire concerning their lands, goods, and chattels, which are forfeited thereby. He must enquire if any decedand accrued; and he must certify the whole of this inquisition to the king's bench, or next assizes. He is to enquire concerning ship-wreck, and to declare whether wreck or not, and who is in possession of the goods. He is to enquire concerning treasure trove. When just exception can be taken to the sheriff for partiality (as that he is interested in the suit, or is of kindred) the process must be awarded to the coroner (10).

3d. *Justices of the peace* are appointed by *special commission*; and are to sue out a writ of *dedimus potestatem*, to empower certain persons therein named to administer the usual oaths to them, which done, they

(9) 4 Inst. 271.

(10) Ibid.

may

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may act. By 5 G. 2. c. 11^h. every justice shall have one hundred pounds per annum, clear of all deductions; and if he acts without such qualification, he shall forfeit one hundred pounds.—And, by 5 G. II¹. no practising attorney, solicitor or proctor, shall be capable to act as justice of the peace. The office subsists during pleasure, and is determinable by the demise of the crown, *i. e.* six months after, by 1 An. c. 8^k.—But by 1 G. III. c. 13^l. if the same person be put in commission by the successor, he need not sue out a new writ of dedimus,—by express writ under the great seal (11), discharging any particular person from being any longer a justice.—By writ of *superfedeas*, which suspends the power of all the justices, which may be revived again by writ of *procedendo*.—By a new commission, which discharges all former justices that are not included therein.—By accession to the office of sheriff or coroner, by 1 M. II. c. 8^m. but it revives of course when he goes out of office. By his commission he is singly to

^h E. II. c. 18. H. VI. c. 11. sect. 1. requires twenty pounds per ann. on pain of twenty pounds.

ⁱ 2 G. I. c. 11. sect. 12. forbids attornies to move on civil bills in the county where they are justices of the peace.

^k Brit. stat. 6 An. c. 7. sect. 8. ^l 7 G. III. c. 16. sect. 3. (11) Lamb. 67. ^m 7 W. III. c. 13. sect. 3.

conserve the peace. He may, with one or more, hear and determine all felonies and other offences.

4th. *Constables*, which are of two sorts, *high* and *petty constables*°. The former are appointed at the court leets of the franchises over which they provide, and in default of such nomination, by justices at the quarter sessions; and they are removeable by the authority that appoints them (12). The latter are inferior officers in every town and parish, subordinate to the high constable. They are chosen by the jury at the court leet; and if no such be held, by two justices, by 14 and 15 C. II. c. 2°. Their general duty is to keep the king's peace, for which they may arrest, imprison, and break open houses^p; they are to execute the warrants of justices of the peace.

5th. *Surveyors of high-ways*.—Their office and duty consists in putting into execution a variety of statutes, for the repairs of public high-ways, leading from one town to another: all which are comprised by

▪ 7 G. II. c. 12. sect. 3. directs the grand jury of each county (except Dublin) to appoint them at the assizes.

(12) Salk. 150. ° 23 G. II. c. 14. sect. 1. in default of appointment at the court leet, they are chosen by justices at sessions.

^p 2 Hawk. p. c. c. 14.

7 G. III. c. 42. and explained by 8 G. III. c. 5^a.

7th. *Overseers of the poor*.—Their office, by 43 El. c. 2. is to raise competent sums for the relief of the poor, impotent, old, blind, and such other, being poor and not able to work;—and to provide work for such as are able, and cannot otherwise get employment.

^a This power is vested in trustees or overseers, by 21 G. II. c. 13.—5 G. III. c. 14.—11 and 12 G. III. c. 20.—13 and 14 G. III. c. 32.—and by 17 and 18 G. III. c. 22. sect. 1. grand juries may present for bridges, altho' no plan is annexed to the affidavit; and for roads, altho' the presentment contains a smaller sum, or number of perches than sworn to. There are also several local acts to which the persons concerned must refer.

C H A P. X.

Of *People*, whether Aliens, Denizens, or
Natives.

NATIVES are such as are born within the dominions of the crown of England.

AN *alien* is one born out of the dominions of England ; yet, by 7 An. c. 5. and 4 G. II. c. 21 *. all children born out of the king's dominions, whose fathers were natural born subjects, are now natural born subjects themselves, to all intents, except their fathers were banished, or attainted for high treason, or were then in service of a prince in enmity with Great Britain. The children of aliens, born in England, are, generally speaking, *natural born subjects*.

A *denizen* is an alien born, who has obtained *ex donatione regis*,—letters patent, to make him an English subject. He may take land by purchase or devise, which an alien never can, but cannot take by inheritance (1). The issue of a denizen, born before denization, cannot inherit to him,

* Brit. statutes.

(1) 11 Rep. 67.

but

but his issue born after, may (2). By 22 H. VIII. c. 8^b. he must pay the same extraordinary duty on merchandise as aliens.— He cannot be a privy counsellor, or member of either house, nor hold any office of trust, civil or military; nor be capable of any grant from the crown, by 12 W. III. c. 2^c.

Naturalization^d can be performed but by act of parliament. By this an alien is put on the exact footing with one born in the king's legiance, except being incapable to be a privy counsellor, &c. by last mentioned statute. No bill for naturalization can be brought into parliament without such clause, by 1 G. I. c. 4. Nor can any one accept the benefit, unless he has received the sacrament within one month before the bringing in of the bill. And, by 7 Jam. I. c. 2. unless he takes the oaths of *supremacy* and *allegiance* in the presence of the parliament. Every foreign seaman who serves two years

(2) Co. Litt. 8. Vaugh. 285. ^b 14 and 15 C. II. c. 9. sect. 19. rule 3. If he constantly resides in the realm he shall only pay as a natural born subject.

^c Brit. stat. 22 G. II. c. 45. sect. 10.

^d 14 and 15 C. II. c. 13. sect. 1. All protestants who shall bring their properties and families into the kingdom, with intent to abide here, and shall conform to the requisites therein required, shall be adjudged natural born subjects.

in

in time of war, on board an English ship, is *ipso facto*, naturalized by 13 G. II. c. 3^e. And ^f all foreign Protestants and *Jews* on residing seven years in any of the American colonies, without being absent two months at a time; or serving two years in a military capacity there, are (on taking the oaths) naturalized, by 13 G. II. c. 7.—20 G. II. c. 24.—2 G. III. c. 25.: and are therefore admissible to such privileges as Protestants born here.

* Brit. stat. 22 G. II. c. 45. sect. 8. requires three years service on board a ship, fitted out as directed by 8 G. II. c. 33. and employed in the Greenland fishery, &c. And also to take the oaths and declaration appointed by 1 G. I.

† Brit. stat. 13 G. II. c. 7. sect. 1.

C H A P. XI.

Of the *Clergy*.

THE people are divided into two kinds; the *laity*, and the clergy. The latter are all persons in holy orders, and in ecclesiastical offices.

A CLERGYMAN cannot be compelled to serve on juries; nor to appear at a court leet, which almost every other person is obliged to do (1). But if a layman be summoned on a jury, and before the trial takes orders, he shall appear and be sworn (2). He cannot be chosen to any temporal office. During his attendance on divine service he is free from arrests in civil causes, 50 Ed. III. c. 5. 1 R. II. c. 15. A clerk in orders shall, in cases of felony, have the benefit of his clergy without being branded in the hand; and shall have it more than once (3), by 4 Hen. VII. c. 13. and 1 Ed. VI c. 12. He cannot sit in the house of commons (4):

(1) F. N. B. 160. 2 Inst. 4.

(2) 4 Leon. 190.

(3) 2 Inst. 637.

(4) Com. journ. 21 Jan. 1580.

4 Inst. 47.

and

and by 21 H. VIII. he is not (in general) allowed to take lands or tenements to farm, on pain of ten pounds per month, and total avoidance of the lease.—Nor shall engage in any trade, or merchandize, under forfeiture of treble value.

By 25 Henry VIII. c. 20^a. an *archbishop* or *bishop* is *elected* by the chapter of his cathedral church, by a license from the crown, accompanied with a letter missive from the king, containing the name of the person whom he would have elected. If they delay the election above twelve days, it falls to the king, who may, by letters patent, appoint whom he pleases. This election, if of a bishop, must be signified by letters patent to the archbishop of the province. If of an archbishop, to the other archbishop, and two bishops, or to four bishops, requiring them to *confirm*, invest, and consecrate such person. And if the dean and chapter do not elect, and that the archbishop or bishops shall refuse to confirm,

^a 2 El. c. 4. sect. 1,—6. They shall be appointed by letters patent under the grand seal of England or Ireland; or the chief governor having letters missive from the crown, may, by letters patent, confer the same on any whom the queen, &c. shall appoint. This act requires the same form of investiture, and inflicts the same punishment on refusal.

invest, and consecrate, they shall be guilty of præmunire.

AN archbishop has his own diocess, wherein he exercises episcopal jurisdiction, as in his province he exercises archi-episcopal.— On receipt of the king's writ, he is to call the bishops and clergy of his province into convocation (5). To him all appeals are made from inferior jurisdictions in his province. When a bishop is consecrated by him, he makes over, by deed to him, his executors, and assigns, the next presentation of such dignity or benefice in the bishop's disposal, as the archbishop shall choose, which is called his option (6), and is only binding on the bishop.

THE archbishop of Canterbury hath, by 25 H. VIII. c. 21^b. the power of granting dispensations to marry at any place, to hold two livings, and the like: and he can confer *degrees* in prejudice of the two universities (7).

(5) 4 Inst. 322, 323. (6) Cowell's interp. tit. option.

^b 28 H. VIII. c. 19. sect. 28, 29, 30. ordains, that the archbishops, &c. may dispense in all causes in which it is customary to dispense by the common law: and that the king may grant a commission for exercising such jurisdiction: and thereby the archbishop of Canterbury hath the like authority.

(7) See the bishop of Chester's case, Oxon. 1721,

A BISHOP has several courts under him, and may visit, at pleasure, any part of his diocese. His *chancellor* holds his courts for him, and must be, by 37 H. VIII. c. 17^c, as well as other ecclesiastical officers, a doctor of the civil law, created in some university, if lay or married.

ARCHBISHOPRICKS, or bishopricks, become void by death, by deprivation for any gross or notorious crime, and by resignation. All resignations must be made to some superior (8). A bishop, to his metropolitan; and he, to the king.

A *dean* and *chapter* are a council to the bishop (9). All ancient deans are elected by *conge d'elire*, by the king and letter missive of recommendation (10):—but those founded by H. VIII. are merely donative by the king's letters patent^d. If any spiritual person be made a bishop, all his former preferments are void, and the king may present to them.

AN *archdeacon* has an immediately subordinate jurisdiction to the bishop.—He is

^c Eng. stat. revived by 1 El. c. 1. (8) Gibf. code 822.
 (9) Co. Litt. 103, 300. 3 Rep. 75. (10) Gibf. code
 173. ^d 4 Inst. 95. Dav. 46, 47.

appointed by him; and has an episcopal jurisdiction independent of him (11). He visits the clergy.

Parsons and *vicars* of churches.—The former are those who have the full possession of all the rights of a parochial church. A parson is synonymously called a *rector*. He hath, for life, the freehold of the parsonage house, the glebe, the *tithes*, and other dues. These are sometimes *appropriate*, that is perpetually annexed to some spiritual corporation, sole or aggregate, being the patron.—The appropriation may be severed, if the patron presents a clerk who is instituted and inducted to the parsonage; and the appropriation can never be again re-united, unless by a repetition of the same solemnities (12). These appropriators were obliged to depute one to perform divine service, who was no more than a vicegerent, and thence called *vicar*. They were formerly paid by an allotment of the *smaller*, and thence called *vicarial tithes*; the *greater* or predial being reserved to the appropriator. By 29 C. II. c. 8^e. these allotments are greatly *augmented* in favour of vicars.

To

(11) 1 Burn. ecclef. law, 68, 69. (12) Co. Litt. 46.

* 1 G. II. c. 18. sect. 1, 2, 3. directs the archbishops and bishops of every diocese to enquire of the full value of each

To be a parson or vicar it is necessary to have *holy orders*,—presentation, institution, and induction. By 13 El. c. 12. no person under twenty-three years of age, and in *deacons* orders, should be presented to any benefice with cure.—And if he was not ordained a *priest* within one year after his induction, he should be deprived. And by 13 and 14 C. II. c. 4. no person can be admitted to any benefice, unless he be first ordained a priest.—But if he obtains orders or license to preach, by money or corrupt means, the person giving such orders, forfeits forty pounds; and the person receiving, ten pounds; and is incapable of any ecclesiastical preferment for seven years, by 31 El.

each living, commonly reputed not to exceed thirty pounds per annum; and to testify the same to the commissioners of the first fruits, who shall enter the same of record; after which, any person may endow such living, whereof the advowson belongs to any archbishop, dean, or dean and chapter, with any lands, &c. of thirty pounds yearly value, or more; so that such augmentation does not exceed seventy pounds per annum; and the person who shall so endow it, if with the consent of the archbishop, &c. shall be the true patron. And by 29 G. II. c. 18. sect. 4, 5, 6. trustees are appointed to act with the commissioners in concert, to dispose in the same manner of the interest of a sum of money, bequeathed by Dr. Boulter, primate, according to the will of the testator, which directs, that the same enquiries shall be made into all livings of less than sixty pounds per annum; and that they shall be augmented by such interest, to the value of sixty pounds per annum.

c. 6^f. The patron may *present* any clerk to the bishop, to be instituted.

A *clerk* may be *refused*, if the patron is excommunicated, and remains in contempt forty days (13),—if he be a bastard, an outlaw, an excommunicate, an alien, under age, or the like, by 3 R. II. c. 3. 7 R. II. c. 12 (14). For any particular heresy or vice that is *malum in se*, or for want of learning^f. If the refusal be for heresy, schism, want of learning, or other matter of ecclesiastical cognizance, the bishop must give the patron notice of his refusal: if the cause is temporal, he is not bound to give notice (15). If an action be brought by the patron for refusal, the bishop must assign the cause. If the cause be temporal, and the fact be admitted, the king's courts must determine its validity. If the cause be of a spiritual nature, and the fact denied, a jury

^f In Ireland there is no penalty annexed to this crime by stat; and therefore it remains an offence at common law, by which all bonds, passed on a simoniacal contract, are void. Hob. 167. Wincomb and Pulleston. Cro. Car. 425. Byrte and Manning. Carth 252. Barlet and Vinor. And thereat it has been considered as a horrid crime. 1 Inst. 17. 6. 89. a Cro. Car. 353. Mackaltar and Totterick.

(13) 2 Rol. abri. 355. (14) Ibid. 356. 2 Inst. 632.

* Or by 17 and 18 C. II. c. 10. to accept any ecclesiastical promotion in England or Wales.

(15) 2 Inst. 632.

shall determine; and if the fact be admitted or found, the court, on advice of learned divines, shall decide its sufficiency (16). If it be want of learning, the court will write to the metropolitan to examine him, and certify his qualifications, which is final (17). If the patron's presentation be admitted, the clerk is to be *instituted*, which is a spiritual investiture. When a vicar is to be instituted, he must take (if required) an oath of perpetual residence, for *vicarius non habet vicarium*. When the ordinary is the patron, and confers the living, the presentation and institution are one, and are called a *collation* to a benefice. If a clerk is instituted on the king's presentation, the crown may revoke it before induction (18). He may, on institution, enter into the parsonage house, and take the tithes; but he cannot maintain an action, nor let them, till induction.

Induction, is giving corporal possession of the church, as by holding the ring of the door, tolling the bell, or the like; and is a form required by law, and performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to do it. By 21 H. VIII.

(16) 2 Inst. 632.

(17) Ibid.

(18) Co. Lit. 344.

c. 13^h. persons wilfully absenting themselves from their benefices, for one month together, or two months in the year, shall incur a penalty of five pounds to the king, and five pounds to whoever will sue for it, except chaplains to the king, and other persons therein mentioned. Legal residence must be in the parsonage house (19).

THERE are many ways by which a man may cease to be a parson or a vicar. 1st. Death. 2d. Taking another benefice¹, if the first be of eight pounds value (20) without a dispensation had, by 21 H. VIII. c. 13. 3d. Consecration; yet former livings may be held *in commendam*. 4th. Resignation, when accepted of by the ordinary (21). 5th. Deprivation; as for *simony*, by 31 El. c. 6, 12 An. c. 12. maintaining any doctrine against the king's supremacy; or of the thirty-nine articles; 1 El. c. 1, 2. 13 El. c. 12^k. or of the common-prayer; for neglecting, after institution, to read the articles in the church, or make the declaration

^h 1 G. II. c. 18. sect. 15. 29 G. II. c. 18. sect. 10. If such persons, as shall have their benefice increased, shall be absent, without license, for sixty-one days in a year, such augmentation shall be void. (19) 6 Rep. 21.

¹ 28 H. VIII. c. 19.

(20) Cro. Car. 456.

(21) Cro. Jac. 198.

^k 17 and 18 C. II. c. 6. sect.

2, 4, 6, 7.

against

against popery, 13 El. c. 12. 14 C. II. c. 4. 1 G. I. c. 6¹. or to take the abjuration oath; for using any form of prayer but the liturgy, 1 El. c. 2^m. or absenting himself sixty days in a year from a benefice belonging to a popish patron, to which the clerk was presented by either university, 1 W. and M. c. 26.—In such like, the benefice is void, without any formal sentence (22).

A *curate* is the lowest degree in the church, being an officiating, temporary minister; though there are *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed. By 12 Ann. st. 2. c. 12ⁿ. if any parson or vicar nominates a curate to the ordinary to be *licensed*, he shall settle his stipend under his hand and seal, at not more than fifty pounds, or less than twenty pounds, per annum.

¹ 17 and 18 C. II. c. 6. sect. 14, 25. which, so far as respects so much of the declaration as is therein recited, is repealed by 4 G. I. c. 3. sect. 2.

^m 2 El. c. 2. sect. 4,—9. If the person offending shall be beneficed, he forfeits, for the first offence, one year's profits thereof, and suffers six months imprisonment;—for the second, deprivation of all his promotions;—for the third, perpetual imprisonment. If the person shall not be beneficed, his first offence shall be punished by imprisonment; and his second by imprisonment for life; and justices of the peace, &c. are required to hear and determine those offences. (22) 6 Rep. 29, 30.

ⁿ 1 G. II. c. 22. sect. 1. Not less than ten pounds.

Church-

Church-wardens are guardians and keepers of the church, and representatives of the parish. They are appointed as custom directs sometimes by the minister; sometimes by the parish. They, by that name, have a property in goods, and can bring actions for them, for the use of the church. If they commit waste, they must be first removed (which the parish may do) and then be called to an account. They are to make rates and levies to repair the church^o. They are to levy one shilling on each person who does not attend church on a Sunday or holiday, by 1 El. c. 2^r. They may pull off a man's hat in church, without being guilty of an assault or trespass(23).

Parish-clerks and *sextons* have freeholds in their office; and therefore may be punished, but not deprived, by ecclesiastical censures (24.) The clerk, according to custom, is chosen by the parish, or the incumbent; and if such custom appears, the king's bench will grant a *mandamus* to swear him in (25)^a.

^o 1 G. II. c. 22. sect. 4. 15 and 16 G. III. c. 22. sect. 1, 2. ^r 2 El. c. 2. sect. 14. (23) 1 Lev. 196.

(24) 2 Rol. abr. 234. (25) Cro. Car. 589.

^a By 23 G. II. c. 12. sect. 10. continued by 15 and 16 G. III. c. 32. sect. 3. their means for raising their salaries is appointed.

C H A P. XII.

Of the *Civil* State.

THIS includes all orders of men, from the highest nobleman to the peasant, who are not included under the former division, or under the military or maritime states; and may include individuals of the other three orders. It is divided into *nobility* and *commonalty*.

OF the former, as forming a branch of the legislature, we have spoken of in ch. 2. b. 1. The titles of nobility now in use, are *dukes*, *marquisses*, *earls*, *viscounts*, and *barons*. They are created by *writ*, or by *patent*; the creation by writ, or king's letter, is a summons to the house of peers by the title of that barony which the king is pleased to confer. That by *patent* is a royal grant to a subject of any dignity and degree of peerage.—By creation by writ, a man is not ennobled unless he actually takes his seat in the house; and it is said, there must be two writs of summons, and a sitting in two distinct parliaments, to make
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an hereditary barony (1).—Therefore, by patent, is the most sure and usual way which enures to a man and his heirs, according to the limitation thereof, tho' he never makes use of it (2). By creation by writ, a person holds the dignity to him and his heirs, without any words to that purport: but if a patent doth not contain words of inheritance, the dignity shall only go to the grantee (3). A nobleman shall be tried by his peers in criminal cases. It is said, this doth not extend to *bishops* who are not peers with the nobility (4); but they are lords of parliament by their baronies. By 20 H. VI. c. 9. *peereffes*, in their own right, or by marriage, shall be tried by the same judicature as peers of the realm. If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers.—But if only so by marriage, and marries a commoner, she loses her *dignity*. They cannot be arrested in civil cases (5). A peer, sitting in judgment, gives his verdict *on his honour*, not his oath (6). So he answers to all bills in chancery (7). But he must be sworn when

(1) Whitlocke of parl. c. 114.

(2) Co. Litt. 16.

(3) Ibid. 9, 16.

(4) 3 Inst. 30, 31.

(5) Finch,

l. 355. 1 Vent. 298.

(6) 2 Inst. 49.

(7) 1 P.

Wms. 146.

he

he is examined as a witness in civil or criminal cases (8),—*in judicio non creditur nisi juratis* (9). Scandal against him is called *scandalum magnatum*, and peculiarly punished, by 3 Ed. I. c. 34. 2 R. II. st. 1. c. 5. 12 R. II. c. 11. He cannot lose his nobility, but by death or attainder, by act of parliament (10).

AMONG the *commonalty* there are also degrees of rank; as *knight of the garter*, *knight-banneret*, *baronets*, *knights of the bath*, *knights batchelors*, *esquires*, *gentlemen*. Irish peers are but *esquires*, *yeomen*, *tradesmen*, *artificers*, and *labourers*; who, by 1 H. V. c. 5. must be named by their addition of estate, degree, or mystery, in all actions and legal proceedings.

(8) Salk, 512.
107. 12 Mod. 56.

(9) Cro. Car. 64.

(10) 12 Rep.

C H A P. XIII.

Of the *Military* and *Maritime States*.

THE former includes the *soldiery*: the latter the seamen of the kingdom.

THE *soldiery* are under *peculiar laws* of their own, made at the will of the king, who is empowered by an annual act of parliament to form *articles of war*, and constitute *courts martial*, with power to try any crime by such articles, and inflict such penalties as the articles direct.—This respects the regular *standing armies*. The soldiery are disbanded at the end of every year unless continued by parliament;—they may make *nuncupative wills* without those forms that are required in other cases, 29 C. II. c. 3. 5 W. III. c. 21. sect. 6.

THE *militia*^a is another body of military men which has been put into a regular subordination,

^a The superior protection arising to a free state from this body of men, whose interests and prosperity are the same with every citizen, in preference to a mercenary corps, is too obvious to need a comment: A full investigation of this point cannot be too arduously sought for at this time,

ordination, principally by 13 C. II. c. 6^b. and are declared to be essentially necessary for the safety and property of the kingdom, by G. III. c. 20. and 9 G. III. c. 42. They are subject when in actual service to the rigour of martial law.

‘THE *maritime state* is nearly in the same situation, but their laws are made by parliament, and they are not disbanded annually nor liable to it.

By a statute of 12 C. II. c. 18.^d called the *navigation act*, no goods are allowed to be imported into England or any of its dependencies in any but English bottoms, or in the ship of that European nation of which the merchandize was the genuine growth or manufacture, and that the master and three fourth of the sailors shall be English subjects.

time, when an invasion is daily expected from a nation by whose insinuation it is to be feared, that thousands of the lower rank of people are aliened from their legiance, and when the idea of the preservation of property can alone prove sufficient to repel them:—That is the cement by which our duty is stimulated; and it is that which makes the sectaries sword forget religion. The reader will see this subject most ably discussed in Polybius—Montesquieu sur les causes de grandeur des Romains et leur decadence, and in his *Esprit des loix*, liv. 11. c. 6. and in Montague’s antient republics.

^b 17 and 18 G. III. c. 13.

^c 7 W. III. c. 12. sect. 22.

^d Eng. stat.

IN

IN times of great emergency the government exert the power of impressing, which is held to be part of the common law : And the statutes 2 R. II. c. 4. and 2 and 3 P. and M. c. 16. 5 E. c. 5. 7 and 8 W. and M. c. 21. 2 An. c. 6. 4 and 5 An. c. 19. 13 G. II. c. 17. all imply that right.—The method of ordering and regulating their discipline is settled by 22 G. II. c. 23^e.—In their *articles* almost every possible offence and punishment is set down.—They have the same privilege as the soldiery of making nuncupative wills.—No sailor can be arrested (on board his majesty's ships) for any debt, unless sworn to be of twenty pounds value ; nor a soldier, unless the debt be of ten pounds, by 1 G. II. stat. 2. c. 14^f.

* Sailors on board merchant ships are regulated by 5 G. II. c. 13. continued by 15 and 16 G. III. c. 32. sect. 1. until June 1782.

^f Eng. statute.

C H A P. XIV.

Of *Master* and *Servant*.

THIS relation is founded on the convenience of the thing, whereby one man calls in others to assist him by their skill and labour,—and for those purposes only; for a *slave* the instant he lands in England, becomes protected in his property and person (1).

1st. OF the first sort, are *menial servants*; their contract arises on the hiring. If it be without any limited time expressed, it is held to be for a year (2). All single men between twelve and sixty, and married ones under thirty years of age: All single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go to service, or certain trades. And no servant can leave his master, or master turn him away, without giving him a quarter's notice, unless on reasonable cause, to be shewed to a justice of the peace; by 5 El. c. 4^a. But they may part by mutual consent.

(1) Salk. 666. (2) Co. Litt. 42.
c. 17. sect. 2. relates to servants only.

• 2 G. I.

2nd. *Apprentices*; who are bound for a term of years to serve their masters. If they are bound to trades, they may be discharged on reasonable cause shewed to the justices at quarter sessions, or by one justice, with appeal to the sessions, 5 El. c. 4^b, who may direct a rateable restitution of their fee. Children of poor persons may be apprenticed by overseers^c, with consent of two justices, till twenty-four years to persons fitting, who are compellable to take them, by 5 El. c. 4. 43 El. c. 2. 1 Jac. I. c. 25. 7 Ja. I. c. 3. 8 and 9 W. and M. c. 30. 2 and 3 An. c. 6. 4 An. c. 19. 17 G. II. c. 5. If one, with whom less than ten pounds hath been given, shall run away, he shall serve his time of absence, at any time within seven years after the expiration of his contract; by 6 G. III. c. 26.

3d. *Labourers*; who are compelled to work if they have no visible effects. The time is defined how long they shall work in summer and winter; the punishment of such as refuse to work; the empowering justices at sessions, or the sheriff to settle their wages; and the inflicting penalties on such as give or exact more wages than

^b 2 G. I. c. 17. sect. 20, 21. 25 G. II. c. 8. sect. 3, 5. 29 G. II. c. 13. ^c Ibid. sect. 12. By minister and church-wardens with consent of one justice.

are settled, are determined by 5 El. c. 4. and 6 G. III. c. 26^d.

4th. *Stewards, factors, and bailiffs.*

A MASTER may *correct* his *servant* or *apprentice* with moderation (3),—tho' his wife may not; if she does, it is good cause of departure (4). If any servant assaults his master, or dame, he shall suffer a year's imprisonment, or other corporal punishment, not extending to life or limb, by 5 E. c. 4^e. The master may *maintain* his servant in any suit at law, against a stranger (5). He may bring an action against any one for beating his servant; but he must assign his damage by the loss of his service (6). If any person hire or maintain a servant while in another's service, an action will lye against the new master and the servant^f, or either of them.—But to be liable to such

^a 33 H. VIII. sess. 1. c. 9. revived and made perpetual by 11 El. sess. 1. c. 5. (3) 1 Hawk. p. c. 130. Lamb. Eir. 127. (4) F. N. B. 168. ^e 25 G. II. c. 8. sect. 2. inflicts the punishment of imprisonment, not exceeding one month; or an abatement of some part of the wages; or by discharging him for such ill behaviour, made perpetual by 5 G. III. c. 15. sect. 39. (5) 2 Roll. abri. 115. (6) 9 Rep. 113. ^f 2 G. I. c. 17. sect. 3. So far as respects the servant, he may be punished in a summary way.

action, the master must have known of his former contract, or must refuse giving him up when applied to (7). If a servant commits a trespass by his master's orders, the *master shall be guilty*, as well as the servant. If an inn-keeper's servant robs his guest, the master shall make restitution (8).—So if a drawer at a tavern sells bad wine, &c. by which a man's health is injured, he has an action against the master (9). If I pay money to a banker's servant, the banker is answerable: not so, if to a physician's servant, for he is not usually concerned so; and I must pay it again. If I constantly pay a tradesman ready money, and he trusts my servant, I am not bound to pay it: but if I sometimes send in trust, and sometimes with money, I am bound (10). If a servant actually in his master's service does, by his negligence, a damage to a stranger, the master is *answerable*; as a smith's man laming my horse in the shoeing. By 6 Ann. c. 3^e. no action shall be maintained against any in whose house an accidental fire shall begin: but if it happens thro' the *negligence*

(7) F. N. B. 167, 168.

(8) Noy's max. c. 43.

(9) 1 Roll. abr. 95.

(10) Dr. and St. d. 2. c. 42.

Noy's max. c. 44.

2 G. I. c. 5. sect. 1, 4.

In case of negligent fire, through the means of a servant, he shall forfeit fifty pounds, or be imprisoned eighteen months.

of a servant, he shall forfeit one hundred pounds, to be distributed among the sufferers; or shall be sent to the work-house to be kept at hard labour for eighteen months. A master is chargeable, if any of his family casteth any thing into the street or high-way, to the damage of any individual, or the common nuisance of the subject (11).

(11) Noy's max. c. 44.

CHAP.

C H A P. XV.

Of Husband and Wife.

THIS relation between persons includes the rights and duties of them to each other. It is considered by the law of England only as a civil *contract*; and therefore allows it to be valid where the parties were, at the time of making it, willing to contract, able to contract, and actually did contract, in the proper forms required.

THEY must be willing to contract, "*consensus non concubitus facit nuptias* (1)."

THEY must be also able to contract,—which all persons are, unless they labour under some peculiar disabilities and incapacities. As, such as are canonical, and therefore sufficient to avoid the marriage in a spiritual court, but which, by our law, makes it only voidable, until sentence of nullity be obtained; such are *pre-contract*: but 26 G. II. c. 33^a. prohibits all ecclesiastic suits

(1) Co. Litt. 33. ■ 33 H. VIII. sess. 1. c. 6. sect. 2.
12 G. I. c. 3. sect. 5, No contract without consummation shall make void any subsequent marriage with carnal knowledge.

to compel a marriage on a contract; *consanguinity*, *affinity*, and some corporal infirmities.—But such marriages are deemed valid, unless the separation is made during the life of the parties (2).

CIVIL disabilities make the marriage void *ab initio*, as a prior marriage, or having another husband or wife living. *Want of age*; if a boy under fourteen, or a girl under twelve, marry, it is inchoate and imperfect; and when they come of age, they may agree or disagree without a divorce; yet if they are *habiles ad matrimonium*, it is a good marriage; and if they agree after they come of age, they need not be married again (3). If one be of years of discretion, and the other not, either may disagree when the other arrives at age (4). *Want of consent* of parents or guardians.

A PENALTY, of one hundred pounds is inflicted on any clergyman who marries a couple without publication of banns, or without a license, by 6 and 7 W. III. c. 6. 7 and 8 W. III. c. 35. 10 An. c. 19^b.

By

(2) Co. Litt. 33. (3) Ibid. 79. (4) Ibid.

^b 9 W. III. c. 28. sect. 3. If any protestant clergyman, popish priest, or other person, shall join in marriage any protestant woman, being heir apparent to her ancestor, or
having

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By 4 and 5 P. and M. c. 8^e. whoever marries any female under sixteen years of age,

having any estate in lands, &c. or being possessed of five hundred pounds, to any person, without having a certificate from the minister, bishop, and neighbouring justice, or two of them, that he is a protestant, he shall suffer one year's imprisonment, and be fined twenty pounds.— 6 An. c. 16. sect. 5, 6. If any beneficed clergyman shall celebrate any marriage of the heir apparent, or other son, being under twenty-one years, of any person having lands, &c. of fifty pounds per annum, or five hundred pounds personal fortune, without consent of parents, &c. he shall be deprived of all his preferments, and shall be incapable of any promotion; and if any other shall offend herein, he shall be transported; which punishment is discretionary in the judge, to change to labour on the Liffey, by 17 and 18 G. III. c. 9. sect. 1. And if any popish priest shall celebrate such marriage, or shall celebrate matrimony between persons, knowing either of them to be protestants, he shall suffer the penalties, &c. of a popish regular; which knowledge, by 8 An. c. 3. sect. 28. shall be presumed, unless he produces a certificate from the minutes of the parish where the parties did reside at the time of the marriage, that they were not at that time protestants.— By 12 G. I. c. 3. sect. 1. If any popish priest, degraded clergyman, or any layman, pretending to be so, shall celebrate any marriage between two protestants, or between a protestant and a papist, they shall be guilty of felony, without benefit of clergy; which punishment is directed to be inflicted, altho' the marriage shall be declared void. By 9 G. II. c. 11. sect. 6. Any minister who shall publish banns between two persons, whereof one is a protestant, and the other a papist, shall be liable to such ecclesiastical censure as he would have been by the ecclesiastical laws, for celebrating a clandestine marriage.

* 9 W. III. c. 28. sect. 1, 4, 7. If any protestant woman, heir to her ancestor, or having any estate in land, &c.
or

age, without consent, shall be subject to fine, or five years imprisonment; and her estate shall, during her husband's life, go to her next heir.

By 26 G. II. c. 33. all marriages celebrated by license, where either of the parties

or having five hundred pounds, shall marry with any person without having obtained such certificate as is required, (see last note) both parties shall be incapable to hold any of said estates, &c. and they shall be vested in the next protestant of kin. And if any protestant shall marry any woman without having obtained such certificate, he shall be deemed a papist, and rendered incapable to be heir, &c. or to sit in parliament, or to hold any office, unless within one year after his marriage, he shall obtain a certificate from the bishop, archbishop, or lord chancellor, that she hath renounced the popish religion: yet when it can be made appear, by proof, that such person was a known protestant, they shall not be liable to any forfeiture or penalty, altho' such certificate had not been obtained. By 2 An. c. 6. sect. 5. if any protestant, having any estate, &c. real or personal, shall inter-marry with any papist, either within or without the kingdom, such person shall be liable to the above-mentioned disabilities and forfeitures. By 6 An. c. 16. sect. 3. If any woman shall induce an heir apparent, or other son of a man, having a yearly estate of fifty pounds, or a personal fortune of five hundred pounds, to contract matrimony, without consent of parents, &c. he being under twenty-one years, she shall not be entitled any dower, jointure, &c. out of such estates.

4 9 G. II. c. 11. sect. 1, 4. If either of the parties shall be intitled to any real estate of one hundred pounds per annum; or personal fortune of five hundred pounds; or if the father or mother shall be in possession of any real estate of

parties is under twenty-one years (not being a widow or widower) without *consent* of the father (or if he be dead) of the mother or guardians, are void. Want of reason, by 15 G. II. c. 30. the marriages of *idiots*, *lunatics*, and persons under frenzies (if found so under a commission, or committed to the care of trustees by act of parliament) before they are declared of sound mind by the chancellor, or the majority of the trustees, shall be void.

THE parties must contract in due form of law. No verbal contracts are of force to compel a future marriage, by 26 G. II. c. 33°. Nor is any marriage *valid*, unless
cele-

of one hundred pounds per annum; or of any personal estate of two thousand pounds: If any person of full age contracts with, or marries any person, under that age, without consent, he shall incur a forfeiture of five hundred, if the party under age shall be possessed of, or intitled to ten thousand pounds.—But if not intitled to that sum, then two hundred pounds; and in both cases the party of full age shall be imprisoned for one year. By 19 G. II. c. 13. sect. 1. all marriages celebrated between a papist and a person who hath professed him or herself to be a protestant at any time, within twelve months before celebration; or between two protestants, if celebrated by a popish priest, shall be void without any legal process whatsoever.

* There being no such statute in Ireland, a verbal contract is of force. 2 Salk. 438. Swinb. sect. 10, 11. Cro. Eliz.

celebrated in church, except by dispensation from the archbishop of Canterbury^f, in pursuance of *banns*, or *license*, between single persons,—consenting,—of sound mind,—of twenty-one years,—or of fourteen in male, and twelve in females, with consent; and without, in case of widowhood. It is held essential, that it be performed by a person in orders (5).

THEY are dissolved by *death* or *divorce*, of which there are two kinds; the one total, *a vinculo matrimonii*, which must be for one of the canonical causes existing before marriage, as consanguinity, and then the marriage is void *ab initio*, and the children are bastards (6).

THE other is partial, *a mensa et thoro*, as when the marriage was in the beginning lawful, but for some supervenient cause it becomes improper or impossible the parties can live longer together; as intolerable ill temper; *adultery*, in either party; and di-

Eliz. 79. 5 Mod. 511. 1 Salk. 120, 121. unless by 33 H. VIII. sess. 1. c. 6. sect. 2. 12 G. I. c. 3. sect. 5. such contract, without consummation, shall not avoid a subsequent marriage consummated.

^f All marriages, not contrary to the above-mentioned statute, &c. nor within the Levitical degrees, are valid.

(5) Salk. 119.

(6) Co. Litt. 235.

vorce

voces *a vinculo matrimonii*, have of late been granted for adultery. In divorce *a mensa et thoro*, the law allows *alimony* to the wife, which is an allowance made by the ecclesiastical judge out of the husband's estates. But in case of elopement with an adulterer, the laws allow no alimony (7).

By marriage the husband and wife are one person (8); therefore he cannot grant her any thing (9). He is bound to *provide* his wife with *necessaries*; and if she contracts debts, he must pay them (10), if they be for necessaries, but not otherwise (11). If the wife elopes, and lives with another man, the husband is not chargeable even for necessaries (12), if the person who furnishes them is apprized of the elopement (13). If she be indebted before marriage, he must pay that debt (14). If she be injured in her person, or property, she cannot bring an action unless the husband joins her (15).—Nor can she be sued, without making the husband a defendant (16). If the husband is banished, or has abjured the realm, she may be sued, or sue, without him (17). In

(7) Cowel tit. alimony.

(8) Co. Litt. 112.

(9) Ibid.

(10) Salk. 118.

(11) 1 Sid. 120.

(12) Stra. 647.

(13) 1 Lev. 5.

(14) 3 Mod. 186.

(15) Salk. 119. 1 Rol. abr. 347.

(16) 1 Leon. 312.

(17) Co. Litt. 133.

criminal

criminal prosecutions she may be indicted and punished separately (18). In trials of any sort they are not allowed to be evidence for or against each other (19), because of the unity of person; for "*nemo in propria causa testis esse debet*;" and "*nemo tenetur seipsum accusare*." But, by 3 H. VII. c. 2. where a woman is *forceably taken away*, and married, she may be witness against her husband. In the ecclesiastical courts a woman may sue, and be sued, without her husband (20). In felonies and other inferior crimes, committed by her, through constraint of the husband, she is excused (21); but not in treason or murder. All deeds executed by her are void, except a fine, or like matter of record (22). She cannot, by will, devise land to her husband, unless under special circumstances (23). A wife may have security of the peace against her husband (24), and a *converso* (25), a husband may *restrain his wife of her liberty*, in case of gross misbehaviour (26).

(18) 1 Hawk. p. c. 3.

(19) 2 Hawk. p. c. 431.

(20) 2 Rol. abr. 298.

(21) 1 Hawk. p. c. 2.

(22) Litt. sect. 669, 670.

(23) Co. Litt. 112.

(24) 2 Lev. 128.

(25) Stra. 1207.

(26) Stra. 478, 875.

C H A P. XVI.

Of Parent and Child.

CHILDREN are of two sorts; legitimate and spurious.

Legitimate are such as are born in wedlock, or within a competent time after. Parents are bound to *maintain, protect, and educate* their legitimate children; but that maintenance is only while they are unable to work, thro' infancy, disease, or accident; and that only with necessaries; the penalty being twenty shillings per month. But by 11 and 12 W. III. c. 4^a. if any *popish parent* shall refuse to allow his *protestant child* a fitting maintenance, to compel him to change his religion, the lord chancellor shall constrain him to do what is just. And by 1 An. c. 30. if *Jewish parents* refuse to allow their protestant children a fitting maintenance, the

^a 2 Ann. c. 6. sect. 3. made perpetual by 8 Ann. c. 3. But, by 17 and 18 G. III. c. 49. sect. 5. no maintenance shall be granted to such child out of the personal property of the parent, except out of such leases as they are enabled to take by sect. 1. of this act.

lord chancellor, on complaint, may make such order as he shall see proper.

PARENTS may *support their children* in law-suits (1). They may justify an assault and battery in defence of their children (2). Where a man went a mile in search of a boy who had beat his son, and beat him so that he died, it was only held manslaughter (3). St. 1 Ja. I. c. 4. 3 Ja. I. c. 5^b. If any person *sends a child* under his government, beyond sea, either to prevent his good education in England, or to enter into any popish college; or to be instructed in that religion, the parent shall forfeit one hundred pounds, to the sole use of him who discovers. By 11 and 12 W. III. c. 4. if any parent, or other, shall send or convey any person beyond sea, to enter into any popish priory, nunnery, monastery, college, or university; or into any private *popish family* or school, or house of Jesuits, in order to be instructed in the popish religion; or shall contribute towards his maintenance, while abroad; he sending, as well as sent, shall be disabled to sue in law or equity, or to be executor or administrator, or to enjoy any legacy or deed of gift, or to bear any office

(1) 1 Lev. 130. (2) 2 Inst. 564. (3) Hawk. p. c. 131. ^b 7 W. III. c. 4. sect. 1.

in the realm, and shall forfeit all his goods and chattels, and all his real estate for life, by 3 C. I. c. 2^e.

A PARENT may *correct* a *child*, under age, in a reasonable manner (4).

A CHILD is equally justifiable to *defend* the *person*, and *maintain* the suit of a bad parent, as a good one; and is equally compellable, by 43 El. c. 2. if of sufficient ability.

A BASTARD is one, not only begotten, but born out of lawful matrimony.—The law doth not require it shall be begotten; but that it shall be born after lawful wedlock, to make it legitimate.—But if a man dies, and his widow be brought to bed within forty weeks after his death, the child is legitimate (5). If a man dies, and his widow so soon marries again, that a child is born within such time as makes it doubtful whose son he is, he may, when he arrives at years of discretion, choose which father he pleases (6). If a husband be out of England for above nine months, so that no access can be presumed, her issue shall

* 7 W. III. c. 4. sect. 1. 2 Ann. c. 6. sect. 1. made perpetual by 8 Ann. c. 3. (4) 1 Hawk. p. c. 130.

(5) Britton. c. 66. page 166. (6) Co. Litt. 8.

be a bastard (7); but access shall be presumed, unless the contrary be proved (8). In a divorce *a mensa et thoro*, if the wife breeds children, they are bastards; but in a voluntary separation, access is supposed, unless the contrary is proved (9). In a divorce in the spiritual court *a vinculo matrimonii*, all issue born under coverture, are bastards (10). So if there is apparent impossibility of procreation, as if the husband be only eight years old, or the like (11). By 18 Eliz. c. 3. 7 Jac. c. 4. 3 Car. I. c. 4. 13 and 14 Car. II. c. 12. 6 G. II. c. 31^d. it is provided, that when a woman is delivered, or will, on oath, before a justice of peace, charge any person with having got her with child, the justice shall apprehend, and commit him, until he gives security to *maintain the child*, or appear at the next quarter sessions to try the fact. A *bastard can inherit nothing*; yet he may have a surname by reputation (12). He may now (though not in strictness of law) hold a dignity in the church (13). He may be legitimated by act of parliament (14); as was John of Gant's bastard children.

(7) Co. Litt. 244. (8) Salk. 123. 3 P. Wms. 276. Stra. 925. (9) Salk. 123. (10) Co. Lit. 325.

(11) Co. Litt. 244. ^d 34 Ed. III. c. 2. Such fathers may be bound to good behaviour. (12) Co. Litt. 3.

(13) 5 Rep. 58. Fortesc. c. 40. (14) 4 Inst. 36.

C H A P. XVII.

Of Guardian and Ward.

THIS is a temporary relation which the guardian bears, as parent to an infant.—The duties and powers are the same as between a father and child. The guardian is bound, when his ward comes of age, to give him an account of all that he has transacted on his behalf; and if he abuses his trust, the court will punish him (1).

THE ward, if a male, may at twelve years of age, take the oath of allegiance. At fourteen is at years of discretion, and may consent or disagree to marriage; may choose his guardian; and may make his testament of his personal estate, if his discretion be actually proved.—At seventeen he may be executor; and at twenty-one is at his own disposal, and may aliene his goods, lands, and chattels.

IF a female, she may, at seven, be betrothed or given in marriage. If proved to have sufficient discretion, may bequeath her

(1) 1 Sid. 424.

personal

personal estate ; and is of age of maturity at twelve. She is intitled to dower at nine. At fourteen she is at age of legal discretion, and may choose a guardian. At seventeen may be executrix ; and at twenty-one, may dispose of herself and lands.

THE *full age* of male or female is *twenty-one years*, which is completed on the day preceding the anniversary of a person's birth (2) ; until which time they are infants.

AN *infant* cannot be sued without joining the name of his guardian, for he is to protect him (3) ; but he may sue by his guardian, or by his *prochein ami* : and by his *prochein ami* he may bring an action against a fraudulent guardian.

IN criminal cases he may be convicted at fourteen years, and capitally punished for any capital offence (4) ; but not under seven ; the period between them remains unsettled. A girl and a boy have been executed for murder at about thirteen years ; and a boy of ten years was convicted and executed for murder (5).

(2) Salk. 44, 625.

(3) Co. Litt. 135.

(4) 1 Hal. p. c. 25.

(5) Foster, 72.

IN civil cases no *laches* shall be imputed to an infant, except in some very particular cases^a. An infant cannot aliene, yet infant trustees, or mortgagees, are enabled to convey, under direction of chancery or the exchequer, the estates they hold in trust, or mortgage to such persons as the court shall appoint, 7 An. c. 19. 4 G. III. c. 16^b. He may present to a benefice (6). He may purchase lands, but when he comes of age he may agree or not (7). He may appoint a guardian to his children, by last will, 12 C. II. c. 24^c. He may bind himself to pay for his necessary meat, drink, physick, and other necessaries, and for his education (8).

^a As for non-presentation to a benefice, Co. Litt. 172. In a writ of dower, 1 Rol. abri. 137. In forfeiture of estrays, Bro. abri. tit. estrays, 5 Rep. 108. Cro. Eliz. 716.

^b 2 G. I. c. 6. sect. 1. (6) Co. Litt. 172.

(7) Ibid. 2. ^c 14 and 15 C. II. c. 19. sect. 3. or by deed executed. (8) Co. Litt. 172.

C H A P. XVIII.

Of Corporations.

THESE are called *bodies politic* or *corporate* ; and are intended to preserve a perpetual succession, and legal immortality.

THEY are first divided into aggregate and sole.

THE former consists of a number of persons kept up by perpetual succession, as the mayor and commonalty of a city.

THE latter consists of one person only, and his successor ; as the king (1).

ANOTHER division of corporations, *sole* or *aggregate*, is into *ecclesiastical* and *lay*.

THE former, where the persons that compose it, are entirely spiritual persons ; as a bishop, a parson ; and are erected for perpetuating the rights of the church.

THE latter are of two sorts, *eleemosynary* and *civil*. The *civil* are such as are erected

(1) Co. Litt. 43.

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for a variety of temporal purposes ; for instance, the king is a corporation to prevent the inconvenience of an *interregnum* ; otherwise, for the advancement of trade, and regulation of commerce ; as the trading companies in London.

THE *eleemosynary* are instituted for the perpetual distribution of free alms, in the manner that the founder has directed ; as hospitals for maintainance of the poor ; all colleges in the universities, and out of them. They may be erected by the king's consent, expressed by letters patent, or charter of incorporation ; or implied, as those which exist by *common law*.

A CORPORATION hath a particular *name*, by which it must sue and be sued ; and do all legal acts, though a very minute alteration is not material (2.) When it is formed and named it has many *powers, rights, capacities and incapacities* ; as, 1. Perpetual succession. 2. To sue, or be sued, by its corporate name. 3. To *purchase lands*, and hold them, to them and their successors. 4. To have a *common seal*, for being invisible, they act by that alone (3). 5. To make *bye laws*, to regulate themselves, (un-

(2) 10 Rep. 122.

(3) Dav. 44, 48.

less contrary to the laws of the land) which is included in the very act of incorporation (4).—But no trading corporation is empowered to make bye laws, which may affect the king's prerogative, or the common profit of the people, under pain of forty pounds, unless approved by the chancellor, treasurer, and chief justices, or judges of assize, at their circuits, by 19 Henry VII. c. 7^a.

AN *aggregate corporation* may take goods and chattels, for the benefit of themselves and successors; but a *sole corporation* cannot (5).

IN ecclesiastical and eleemosynary corporations, the king or the founder may give rules, laws and ordinances, which lay corporations, founded for civil purposes, are not subject to, but are bound by common law, and their own bye laws (6).

AGGREGATE corporations may have, by their constitution, a head, as dean, master, or the like; and cannot do any act in his vacancy, except only appointing another; nor are they capable of receiving a grant,

(4) Hob. 211. * 10 H. VII. c. 7. All such acts to be void.
(5) Co. Litt. 46. (6) Lord Raym. 8.

not having a head (7).—But there may be a corporation without a head, as where each member has equal authority (8). In them too the act of the majority is the act of the whole (9). No devise, by will, to a corporation is good, because excepted out of the statute of wills, 34 H. VIII. c. 5^b. except for charitable uses, by 43 E. c. 4. narrowed by 9 G. II. c. 36. They cannot purchase without license from the king.—Lands held by them are said to be held in *mortmain*.

THEY may be visited, if ecclesiastical, by the ordinary, to correct all irregularities.—In all lay corporations, the *founder* and his heirs or assigns are their *visitors*, for the same purpose (10). The king is the visitor of all civil corporations, and he exercises his jurisdiction in the king's bench. In eleemosynary foundations, the founder and his heirs are the visitors; but if he has assigned any other person to be visitor, the assignee is invested with the power, in exclusion of the heir. If the founder has appointed no visitor, the bishop must visit (11).

(7) Co. Litt. 253, 264.

(8) 10 Rep. 30.

(9) Bro. abr. tit. corp. 31, 34.

^b 10 C. I. sess. 2.

c. 2. All devises to bodies corporate are void, and the lands shall descend to the heir at law, Hob. 136.

(10) 10 Rep. 31.

(11) 2 Inst. 725.

Colleges are lay corporations, although the ordinary is their *visitor*; but their sentence was liable to be examined and redressed by the king's bench, as was the case in *Philips and Bury* (12); determined by three judges, that the jurisdiction could not exclude the common law; and judgment was given in that court. But the lord chief justice Holt held, that the office of visitor was to judge according to the statutes of the college, and to expel and deprive on just occasions, and hear all appeals, and from him only redress was to be obtained; on which a writ of error was brought before the lords, and judgment was reversed.

ANY member of a corporation may be disfranchised, by acting contrary to the laws of the society, or of the land; or he may resign (13). The corporation may be dissolved; and when it is dissolved, its *lands shall revert to the person*, or his heirs, who granted them (14). Debts due by or to a corporation are extinguished by its dissolution. It may be dissolved by act of parliament; by the natural death of its members; by surrender of its franchises; through negligence or abuse of its charter, it may be

(12) Lord Raym. 5. 4 Mod. 106. Shower 35. Skinn. 407. Salk. 403. Carthew, 180. (13) 11 Rep. 98.

(14) Co. Litt. 13.

forfeited. This is done by writ of *quo warranto*, to enquire by what right the members now exercise their corporate power, having forfeited it by such proceedings.

By 11 G. I. c. 4^e. no corporation shall be dissolved, tho' the mayor or head officer shall not be duly elected on the day appointed in the charter, or established by prescription; and directions are given for appointing a new officer, in case there be no election, or a void one, on the charter or prescription day.

* 19 G. II. c. 12. sect. 7.

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A
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OF THE
L A W S
OF
ENGLAND AND IRELAND.

B O O K II.

C H A P. I.

Of Property in general.

WHILST the world was thinly inhabited, it is reasonable to suppose, that all things were in *common*; and no part of it was permanent to any one; yet whoever was in the *occupation* of any determinate spot for rest, or the like, acquired for the time a sort of ownership, from which it would be contrary to the law of nature to have driven him: however, the instant he quitted the occupation of it, another might seize it without injustice. But when mankind

kind increased in number, craft, and ambition, it was necessary to appropriate not only the use, but the property. Had not a separate property been vested in individuals, the world must have continued to this day a forest; because no man would improve that spot, which the moment he had quitted, should become the property of another.

PROPERTY being thus attained by occupancy, it remains by the principles of universal law in the occupant, until he shews by some other act, his intention to abandon it; which is the law of England at this day, with regard to treasure-trove.—See chap. 8. book 1. The most effectual way to abandon property is by death. Then all property must cease; but every civilized government (to prevent the confusion that must attend the next occupant, seizing the effects of the deceased) have given the dying person a power to continue his property, by will: or, the municipal law will step in, and declare who shall be the successor. There are some things, however, that must remain unavoidably in *common*; such are the elements;—such are *animals ferae naturæ*, in which a man has only an usufructuary property.

CHAP.

C H A P. II.

Of *real Property*; and first, of *Corporeal Hereditaments*.

THINGS real, are usually said to consist in lands, tenements, and hereditaments.

LAND comprehends all things of a permanent, substantial nature.

TENEMENT signifies every thing that may be holden, provided it be of a permanent nature, whether it be of a substantial or an ideal kind. Thus *liberum tenementum*, or freehold, is applicable not only to lands, but also to offices, rents, and the like (1).—Advowsons, franchises, a peerage, &c. are all tenements (2).

HEREDITAMENTS is the largest and most comprehensive expression; it includes not only lands and tenements, but whatever may be inherited, whether corporeal, incorporeal, real, personal, or mixed (3).—Thus an heirloom, which is neither land

(1) Co. Litt. 6.

(2) Ibid. 19, 20.

(3) 1 Inst. 6.

nor tenement, but a mere moveable, yet being inheritable, is an hereditament. Hereditaments are of two kinds; corporeal and incorporeal.—Corporeal, consist of substantial objects, all which may be comprehended under the denomination of land only. Land hath in its legal signification, an indefinite extent, upwards and downwards, *cujus est solum ejus est usque ad cælum*, is the maxim of law. By the name of land, which is *nomen generalissimum*, every thing terrestrial will pass (4).

(4) Co. Litt. 4, 5, 6.

CHAP.

C H A P. III.

Of *incorporeal* Hereditaments.

AN incorporeal hereditament is a right issuing out of things corporate, (whether real or personal) or concerning, annexed to, or exerciseable within the same (1).

THEY are of ten sorts. 1st. *Advowson*; which is the right of presentation to a living. He who has it, is called the patron. It is either *appendant*, or in *gross*. So long as it continues annexed to the manor out of which it was erected, it is an advowson appendant (2). But if the property has been once severed from the manor, it is then an *advowson in gross* (3); and can never be appendant again. Advowsons are also either presentative, collative, or donative (4). An advowson *presentative*, is where the patron hath a right of *presentation* to the bishop, and to demand of him to present his clerk, if he be canonically qualified. *Collative*, is where the bishop and patron

(1) Co. Lit. 19, 20.

(3) Ibid. 120.

(2) Ibid. 121.

(4) Ibid.

are the same person. *Donative*, is when the king, or any subject by his license, doth found a church, and ordains that it shall be in the gift or disposal of the patron.—Subject only to his visitation, and not the ordinary's, and vested in the clerk by the patron's deed of donation, without presentation, institution, or induction (5). If the patron once receives his privilege of donation, and presents to the bishop, and the clerk is admitted, it shall be for ever presentative (6).

2nd. *Tithes* are the tenth part of the increase yearly arising and renewing from the profits of lands, the stock on lands, and the personal industry of the inhabitants. The first species are called *predial*; as ^a grass, corn, wood (7). The second, *mixed*; as wool, milk, pigs, &c (8). Of these the tenth must be in gross. The third, *personal*; as of trades, occupations, fisheries, and the like; and of these only, the tenth of the clear profits is due (9). Tithes are dues of common right to the parson of the parish, unless there be a special exception.

(5) Co. Litt. 344.

(6) Ibid. Cro. Jac. 63.

^a By a vote of the house of commons in the year , any lawyer who shall appear as council for the recovery of the tithe called Agistment (grass) is declared an enemy to his country.

(7) 1 Rol. abri. 635. 2 Inst. 649.

(8) 1 Rol. abri. 635. 2 Inst. 649.

(9) 1 Rol. abr. 656.

Lands and their occupiers may be *discharged from tithes*, either in part or totally, by *real composition*; or by custom or prescription. By real composition, which is not good since 13 El. c. 10. if^b for a longer time than three lives, or twenty-one years, so that a composition for a longer time must be made before that period; the agreement must be made between the owner of the lands and the parson or vicar, with the consent of the ordinary and the patron. Secondly, By custom or prescription; where *time out of mind*, such person or such lands have been either partially or totally discharged. This custom or prescription is either *de modo decimandi*, or *de non decimando*: a *modus decimandi*, is where a particular manner of tithing has been allowed. To make a good *modus*, the following rules must be observed. It must be certain and invariable (10). The thing given in lieu of tithes to the parson must be beneficial to him, and not for the emolument of third persons only (11). It must be something different from the thing compounded for (12). One cannot be discharged from one species of tithes, by paying a *modus* for another (13). The recom-

^b 10 and 11 Ch. I. c. 2. sect. 8. 6 G. I. c. 14. sect. 1, 3. For no longer time, than during their incumbency.

(10) 1 Keb. 602.

(11) 1 Rel. abr. 649.

(12) 1 Lev. 179.

(13) Cro. Eliz. 446. Salk. 657.

pence must be in its nature as durable as the tithes discharged by it (14); that is an inheritance certain. The *modus* must not be too large, which is called in law, a *rank modus* (15) Time of memory hath been ascertained by law, to commence from the reign of Richard I. and any custom may be destroyed by evidence of its non-existence in any part of the period, from his days to the present. A prescription *de non decimando*, is a claim to be discharged from tithes, and to pay no compensation in lieu of them. Thus the king is discharged from tithes (16). A vicar shall pay no tithes to the rector, nor the rector to the vicar (17). But both the king's, and the rector's and vicar's tenants shall pay tithes of those lands, which if they held, would be free. Spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands discharged from tithes, by various ways (18).—As by real composition; by the pope's bull of exemption; by unity of possession, as when the rectory of a parish and lands therein belonged to a religious house; by prescription; by virtue of their order, as knights

(14) 2 P. Wms. 462.

(15) 11 Mod. 60.

(16) Cro. Eliz. 511.

(17) Ibid. 479.

(18) Hob. 309. Cro. Jac. 308.

templars,



templars, and others, whose lands were exempted by the pope (19); tho' on the dissolution of monasteries, by H. VIII. most of these exemptions would have fallen with them, had they not been supported by 31 H. VIII. c. 13. by which all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged from tithes, as the abbeys had held them. So if a man can shew his lands to have been such abbey lands, and also immemorially discharged from tithes, by any means before-mentioned;—this is a good prescription *de non decimando*.

3d. *Common*, or right of common, is a profit which one hath in the land of another.—It is of four sorts; *common of pasture*; of *piscary*; of *turbary*; of *estovers*. *Common of pasture*, is either *appendant*, *appurtenant*, because of vicinage, or *in gross* (20). Common *appendant*, is a right to put commonable beasts on the lord's waste, which are beasts of the plough, or such as manure the ground. Common *appurtenant*, is where the owner of the land has a right to put in other beasts besides such as are commonable; as hogs, goats, and the like.

(19) 2 Rep. 44. Seld. tithes, c. 13. sect. 2.

(20) Co. Litt. 122.

This not arising from necessity, as the former, can only be claimed by immemorial usage and prescription (21). Common, *because of vicinage*, is where the inhabitants of two townships, which lie contiguous to each other, have usually inter-commoned, the beasts of one straying into the other's fields. Common *in gross*, is such as is neither appendant, or appurtenant, to land, but is annexed to a man's person. This is an inheritance distinct from any landed property, and may be vested in one who has not a foot of ground in the manor. All these species are limited as to number and time, but there are commons *without stint*, which last all the year. By the statute of Merton, 20 H. III. c. 4. 29 G. II. c. 36. and 31 G. II. c. 41. a lord of a manor may enclose as much of the waste as he pleases, for tillage or wood ground, provided he leaves common sufficient for those that are intitled thereto. This enclosing, when justifiable, is called *approving* (22). Either the lord or the commoner may both have actions for damage done, either against strangers or each other: the lord for the public; the commoner for the private damage (23). *Common of piscary*, is a liberty to fish in ano-

(21) Co. Litt. 122.

(22) 2 Inst. 474.

(23) 9 Rep. 113.

ther man's water ; as *turbary* is the liberty of cutting turf on another man's ground (24). There is also a common for digging coals, mines, and the like. *Common of estovers*, is a liberty of taking necessary wood for the furniture of a house off another's estate. *House bote* is an allowance of wood to repair or burn in the house : *plough bote*, *cart bote*, and *hedge bote*, for the repairs of ploughs, carts, and hedges. These must be reasonable ; and such, any tenant or lessee may take off his land without leave, unless restrained by special covenant (25).

4th. *Ways*, or the right of going over another's ground. This may be grounded on a special permission, in which case it is confined to the person of the grantee. A way may be by prescription, as where all the occupiers of a farm have used immemorially to cross another's grounds. A right of way may arise by act of law ; as if a man grants a piece of ground in the middle of a field, I may cross his land without a trespass (26). It is held, that if a man hath a right of way over another's land, and the road is out of repair, he who has the right

(24) Co. Litt. 122.

(25) Ibid. 41.

(26) Finch law, 63.

of way may cross what part of the land he pleases (27).

5th. *Offices*, which are the right to exercise a public or private employment, and to take the fees thereunto belonging.—In which a man may have an estate to him and his heirs, or for life or years, or during pleasure. But offices of public trust, if they concern the administration of public justice, cannot be granted for a term of years (28). Nor can a judicial office be granted in reversion; but ministerial offices may (29). By 5 and 6 Ed. VI. c. 16. no public office shall be sold under pain of disability to hold or dispose of it.

6th. *Dignities*, are of the same nature with offices,—See chap. 12. book 1.

7th. *Franchises*, are royal privileges subsisting in the hands of a subject (30). They must arise by the king's grant, or by prescription, which presupposes one. They may be vested either in natural persons, or bodies politic;—in one man, or in many. But a franchise bestowed on one, cannot be bestowed on another (31). To be a county

(27) Lord Raym. 725. 1 Brownl. 212. 2 Show, 28.
 1 Jon. 297. (28) 9 Rep. 97. (29) 11 Rep. 4.
 (30) Finch law, 164. (31) 2 Rol. abr. 191. Keilw. 196.
 palatine,

palatine, is a franchise,—to hold a court-leet, or the like,—to have wrecks, estrays, and the like, are all franchises. To have a fair or market, with a right of taking toll, either there or at bridges, &c. which tolls must have a reasonable cause of commencement (as in consideration of repairs, or the like) else the franchise is illegal and void (32). Forests, chases, parks, warrens, or fisheries, endowed with privileges of royalty, are franchises. A *forest*, in the hands of a subject, is the same as a chase, being subject to the common, not the forest laws (33). A *chase* differs from a park, in that it is not enclosed. A man may have a chase in another man's ground, it being a liberty of keeping *beasts of chase*, or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A *park* is an enclosed chase extending only over a man's own grounds. The word signifies any inclosure, but it is not every field that a gentleman pleases to inclose and stock with deer, that is legally a park. The king's grant, or immemorial custom, is necessary to make it so (34); though the difference now is not great, only that it is unlawful at the common law for any person

(32) 2 Inst. 220.

(33) 4 Inst. 314.

(34) Co. Litt. 233. 2 Inst. 199. 11 Rep. 86.

to kill beasts of park or chase (35), except such as have these franchises of forest, chase, or park. *Free warren* is erected for the preservation or custody of beasts and fowls of warren; but this custom is fallen into great disregard since the introduction of the game-laws for their preservation, which was the chief intention of that franchise. A *free fishery* is a royal franchise of exclusive right of fishing in a public river. This was prohibited by king John's great charter, and the rivers directed to be laid open; and was extended by 2 (c. 20.) and 3 (c. 16.) charters of Hen. III. to those that were fenced under Rich. I. so that a free fishery ought to be as old as the reign of Henry II. He that has a several fishery must be also owner of the soil.

8th. *Corrody* is a right to receive certain allotments of victuals and provisions, for one's maintenance (36), in lieu of which (especially among *ecclesiastics*) a *pension* or sum of money is substituted.

9th. *Annuities*, which are very distinct from rent charges; the latter being a burden issuing out of lands; the former being chargeable only on the person of the gran-

(35) Co. Litt. 233.

(36) Finch law, 162.

tor (37); which is of so little account in law, that if granted to an eleemosynary corporation, it is not within the statute of mortmain (38).—Yet a man may have a real estate in it, although his security is personal.

10th. *Rent* signifies a return or compensation, and a certain profit issuing yearly out of lands and tenements corporeal. It must be a profit, tho' it need not be in money. It must be certain, or that which may be reduced to a certainty by either party. It must issue yearly, though it need not issue every successive year, but may be reserved every second, third, &c. year (39). It must issue out of the thing granted. It must issue out of lands and tenements corporeal; therefore a grant cannot be reserved out of an advowson, or the like (40); but a grant of such a sum may operate as a personal contract, and oblige the grantor to pay the money, or subject him to an action of debt (41).

At common law there are three manner of rents (42). *Rent service*, so called because it has a corporal service incident to it;

(37) Co. Litt. 144.

(38) Ibid 2.

(39) Ibid. 47.

(40) Ibid. 144.

(41) Ibid. 47.

(42) Litt.

sect. 213.

as at the least fealty (43); or fealty and ten shillings rent; and for these, if they are behind or in arrears at the day appointed, the lord may distrain without any special power reserved, provided he hath the reversion (44). A *rent charge* is, where the owner of the land hath no future interest; as if a man makes over his whole estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant of distress, if the rent be in arrear. Here, by the covenant, though not of common right, the land is liable to distress, and thence called a rent charge (45). *Rent seck* is nothing but a rent reserved without any power of distress. There are besides, *rents of assize*, which are established rents of freeholders and copy-holders, and which cannot be departed from or varied (46). *Rack rent* is of, or near the full value of the land. A *fee-farm rent* is a rent charge, issuing out of an estate in fee, of at least one-fourth of the value of the land at the time of its reservation (47); for a grant of lands reserving so considerable a rent, is only letting them to farm in fee, instead of for lives or years. The difference between all these is now

(43) Co. Litt. 142.

(44) Litt. sect. 215.

(45) Co. Litt. 143.

(46) 2 Inst. 19.

(47) Co. Litt. 143.

abolished, and there is the like remedy by distress for rents seck and affize, as in case of rents reserved upon lease, by 4 G. II. c. 28^c.

RENT is payable on the land, if no particular place is mentioned (48). But to the king, it must be paid at his exchequer, or to his receivers in the country (49); and strictly it is demandable and payable before the time of sun-set of the day whereon it is reserved (50); though some have thought, not till midnight (51).

^c 10 and 11 C. I. c. 7. sect. 2. (48) Co. Lit. 201.

(49) 4 Rep. 73. (50) Anderf. 253.

(51) 1 Saund. 287. 1 Chanc. prec. 555.

C H A P. IV.

Of the *Feodal System*.

THE ^a constitution of *feuds* had its original ^b from the military policy of the northern nations (1), who all migrating, poured themselves into Europe at the declension of the Roman empire; and in order to secure their new acquisitions, large tracts were allotted by the conquering general to the superior commanders, and by them subdivided among the inferior officers, and most deserving soldiers (2). These allotments were called *feoda*, *fees*, which in the northern language signifies stipend or reward (3). The condition was, that the possessor should do service faithfully at home and abroad, to him by whom they were given, for which he took the *juramentum fidelitatis*.

^a This constitution never existed in Ireland. ^b See M. de L'Homme on the English constitution, c. 1. and Robertson's history of Charles the V. vol. 1.

(1) Spelman of feuds, and Wright of tenures. p. tot.

(2) Wright, 7. (3) Spelman glos. 218.

THE introduction of those tenures was effected here, in the reign of William the conqueror, not immediately after the conquest, but by degrees, especially by an invasion which the Danes made some time after; when the weakness of the nation, and the grievances occasioned by the foreign force, which was brought in to repel them, so far co-operated with the king's remonstrances and wishes, that the latter end of the following year the king at Sarum had submitted into his hands almost all the lands in the kingdom, which were put under this military yoke, and their possessors became his vassals, and did homage and fealty to his person. Hence arises the fundamental principle that the king is the original proprietor of all the lands in the kingdom.

At first these feuds were held at the will of the lord. They then became certain for one or more years; and as the condition of those grants was to do service, &c. women, infants, and professed monks were incapable of holding a genuine feud.

C H A P. V.

Of the Antient *Engliſh Tenures*.

ALMOST all the property of this kingdom is, by our laws, ſuppoſed to be holden of the king, in conſideration of certain ſervices to be rendered by the tenant. The thing holden is therefore ſtiled a *tenement*; the poſſeſſors, *tenants*; and the manner of their poſſeſſion, a *tenure*; of which there ſeem to have been *four kinds*. *Frank tenements*, of which ſome were held freely, in conſideration of *knights ſervice* and *homage*. Some in *free ſocage*, with the ſervice of fealty only. *Villanages*, of which ſome were *pure*, and others *privileged*. He that held in pure villenage ſhould do whatever was commanded him, and was always bound to an uncertain ſervice. The other was *villain ſervice*; but ſuch as was certain and determined.

1ſt. The moſt univerſal and honourable ſpecies of tenure was by *knights ſervice*. To make this, a determinate quantity of land was neceſſary, the value of which was rated at twenty pounds per annum, of which a
certain

certain number made a *barony*. He who held it was bound to attend his lord in the wars forty days in every year, if called on. It had seven consequences as inseparably incident to it. 1. *Aids*, which were to ransom the lord, if taken prisoner (1); to make the lord's eldest son a *knight* (2); and to marry his eldest daughter, by giving her a suitable portion. 2. *Reliefs*, which was a fine or composition paid to the lord for taking up the estate which was lapsed by the death of the last tenant. 3. *Primer seisin*, which was a right that the king had when any of his tenants died, to receive of the heir (if of full age) one year's profits of the lands, if they were in possession, and half a year if they were in reversion, expectant on any estate for life (3). This gave a handle to the popes, who claimed to be lords of the church, to claim from every clergyman the first year's profits of his benefice, by way of first fruits. 4. *Wardships*, which were due instead of the two former, when the heir was under twenty-one years, being a male; or fourteen, being a female (4). It consisted in having the custody of the body and lands of such heir without any account of the profits, till the age of twenty-one in males,

(1) Feud. l. 2. sect. 24.

(2) 2 Inst. 233.

(3) Co. Litt. 77.

(4) Litt. sect. 103.

and

and sixteen in females. If the female was fourteen years old at the death of her ancestor, the lord had no wardship, yet if she was under fourteen, and the lord once had her in ward, he might keep her until sixteen years, by 3 Ed. 1. c. 22. When the heirs arrived at such respective ages, they might sue out livery of *ousterlemain* (5); for this they were obliged to pay half a year's profit of the land. 5. *Marriage*, by which the lord or guardian had a right of disposing of his infant ward in matrimony, which if they refused complying with, they forfeited so much as a jury would assess, or any one would *bona fide* give for such alliance (6); and if they married themselves without consent, they forfeited double value (7). 6. *Fines for alienation*, which were due to the lord whenever the tenant had occasion to make over his land to another. 7. *Escheat*, which is the determination of the tenure or dissolution of the bond between the landlord and tenant, from the extinction of the blood of the latter, as if he died without heirs, or that his blood was corrupted by commission of treason or felony.

THIS description is of a knight's service proper; there were also other species of

(5) Co. Litt. 77.

(6) Litt. sect. 110.

(7) Co. Litt. 82. Stat. Merton, c. 6.

knights service, so called because the service was of an honourable kind, and uncertain; such as tenure by *grand serjeanty*, whereby the tenant was bound, instead of serving the king generally, to do some honorary service; as to carry his banner, or the like; or to be his champion, or other officer, at his coronation (8). Tenants, by *cornage*, were such as were to wind a horn when the Scots or other enemies entered the land. These services, at length, became troublesome, and they began to be compounded for, first by sending others in their stead, and then by pecuniary satisfaction; and was then called *scutagium*, *scutum* being a denomination of money; and in Norman French, *escuage*; which *escuages* or *scutages*, were the ground work of all succeeding subsidies, and the land-tax at present. These tenures are abolished by 12 C. II. c. 24. which enacts, that all lands shall be held in free and common socage, save only tenures in frank almoign, copy-holds, and the honorary service of grand serjeanty.

(8) Litt. sect. 153.

C H A P. VI.

Of the Modern *English Tenures*.

THE tenures by which the lands of the kingdom are now held are socage, frank almoign, copyholds, and grand serjeanty^a.

Socage is a tenure by any certain and determinate service. It is two sorts; *free socage*, where the services are honourable and certain; and *villein socage*, where the services, though certain, are of a baser nature. As the criterion of this species of tenure is the having its services ascertained, it includes all methods of holding free lands by certain rents; as *petit serjeanty*, tenure in *burgage*, and *gavel kind*. *Petit serjeanty* bears a great resemblance to *great serjeanty*; as the former is personal service, so the latter is a rent; both tending to some purpose relative to the king. By it, there is due to the king some small implement of war, as a sword, a lance, or the like (1). Tenure in *burgage* is, where the king or another

^a The lands of Ireland are held by this tenure, by 14 and 15 C. II. c. 19. sect. 5,—10.

(1) Litt. sect. 159.

person is lord of an antient *borough*, in which the tenants are held by a certain rent (2). Tenures in *gavel kind*^a have various properties. The tenant is of age to aliene his estate by feoffment at fifteen years (3). The estate does not escheat in case of attainder and execution for felony (4). In most places the tenant might dispose of his land by will, before the statute for that purpose (5). The lands descend to all the sons together (6). *Reliefs* are due on socage tenures, by 12 C. II. c. 24. and therefore whenever lands in fee simple are holden by a rent, it is due of common right upon the death of the tenant (7). This relief is one years rent payable to the lord, be it great or small. *Wardship* is also incident to socage tenure, but instead of vesting in the lord, it is directed, by 12 C. II. c. 24.^c that the father may, by will, *appoint a guardian* to his child, until he attains the age of twenty-one years; and if no such ap-

(2) Litt. sect. 162, 163. (3) Lamb. peramb. 614.

^b There is no gavel tenure in Ireland; for, by 17 and 18 G. III. c. 49. sect. 1. the lands of papists are directed to be descendible, devisable, and transferrable, as if they were the property of any other subject; and they were the only persons who held lands by that tenure.

(4) Lamb 634. (5) F. N. B. 198. Cro. Car. 561.

(6) Litt. sect. 210. (7) Lev. 145.

^c 14 and 15 C. II. c. 19. sect. 3.

pointment be made, the court of chancery will frequently appoint one. *Escheats* are incident to tenure in socage, except in gavel kind land.

FROM the tenure of *pure villeinage* arise our present *copy-hold tenures*; to support which, it must appear that the lands are part of, and situate within that manor, under which it is held.—That they have been demised, or demiseable, by copy of court-roll immemorially: so that no new copyhold can be granted at this day. The appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, service, reliefs, and escheats. The two latter belong only to a copyhold of inheritance; the former, to those for *life* also.—Copyholds have also *berriots*, (of which, see chap. 28. of this book) *wardship*, and *finer*. *Wardship* partakes both of that in chivalry and in socage; like that in the former, the lord is the *legal guardian*, who usually assigns some relation of the tenant to act in his stead.—Like guardian in socage, he is accountable to his ward for the profits. Of *finer*, some are in the nature of *primer seisin* due on the death of each tenant; others are mere fines on alienation. They are sometimes arbitrary at the lord's will; sometimes

times fixed by custom ; but even when arbitrary, the courts of law have tied them down to be reasonable.

THE tenure by *privileged villeinage*, or *villein socage*, is such as has been held of the kings from the conquest. The tenant cannot aliene without licence ; so that they are but an exalted species of copyhold, subsisting at this day, *viz.* the tenure of *antient demesne*, which consists of those lands or manors that, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror, as appears by the great survey in the exchequer, called *domesday book* (8). They have a right to try their property in a peculiar court, called *a court of antient demesne*, by a process, called *a writ of right close* (9). They were exempted from taxes, and from contributing to the expences of knights of the shire, and the like (10). These lands cannot be conveyed from man to man, but must be surrendered in the manner of copyholds ; yet with this difference (11), that in the surrender of these lands, it is not used to say, " to hold at the will of the lord,"

(8) F. N. B. 14, 16.

(9) Ibid. 11.

(10) Ibid. 14.

(11) Kitchen on courts 194.

but

büt only “to hold according to the custom
“of the *manor*.”

Tenure in frank almoign is that whereby a religious corporation, aggregate or sole, holdeth lands to them and their succeßors for ever (12). The service they are bound to render is to pray for the souls of the donor and his heirs, dead or alive. This is the *tenure* by which the parochial clergy, and many ecclesiastical and eleemosynary foundations hold their lands at this day. The nature of the service being altered to the purer doctrines of the church of England. If the service be neglected, the law gives no remedy by distress, but only by complaint to the ordinary or visitor, to correct it (13). All such donations are now out of use; for, by stat. West. 3. of *quia emptores*, 18 Ed. I. none but the king can give lands to be holden by this tenure.

(12) Litt. sect. 133.

(13) Ibid. sect. 136.

C H A P. VII.

Of Freehold Estates of *Inheritance*.

THE next object of our enquiry is estates. An *estate in lands*, &c. signifies such interest as the tenant hath therein.—So that if a man grants all his estate in Dale to A. and his heirs, every thing that he can possibly grant shall pass (1). An *estate of freehold* is the possession of the soil by a freeman (2); such as requires actual possession is a freehold. It therefore requires livery of seisin, in corporeal hereditaments, and what is equivalent thereto in incorporeal (3).

ESTATES of inheritance are divided into ABSOLUTE FEE SIMPLE, and INHERITANCES LIMITED; one species of which is called *fee tail*. Tenant in *fee simple* hath lands to hold to him and his heirs for ever (4), without mentioning what heirs. A subject has only the *usufruct* property of the soil.—The king has the *allodial*. Hence when we ex-

(1) Co. Litt. 345.

(2) Britton. c. 32.

(3) Litt. sect. 59.

(4) Ibid. sect. 1.

press the strongest estate any subject can have, we say, "he is seized in his demesne, "as of fee," and not "in fee;" because it is held of a superior. In an incorporeal hereditament, a man shall be said "to be "seized as of fee (5);" because it is not the demesne or land, but only something arising thereout. The property may be in one man, while the appendage is in another. A. man may be seized as of fee, of a way over the land of B. who is seized in his demesne as of fee. The fee simple generally resides somewhere, altho' many estates are carved out of it. If one grants a lease for twenty years, the fee remains in the grantor and his heirs, and will revert to him or them when the term is expired.—Yet sometimes it may be in *abeyance*, there being no person *in esse* in whom it can vest. Thus in a grant to John for life, remainder to the heirs of Richard, the inheritance is not granted to John or Richard, nor can it vest in the heirs of Richard, until his death (6), *nam nemo est haeres viventis*:—So when a parson dies. The word *heirs* is necessary to make a fee.—For if land be given to man for ever, or to him and his assigns for ever, this vests in him but an estate for life (7).

(5) Litt. sect. 10.

(6) Co. Litt. 342.

(7) Litt. sect. 1.

But

But this rule is softened (8); 1st. In a devise by will; where by a devise to a man for ever, or to one and his assigns for ever, or to one in fee simple, the devisee hath an estate of inheritance. But if the devise be to a man and his assigns, without words of perpetuity, there is but an estate for life. 2nd. This rule does not hold good in fines and recoveries, for thereby an estate in fee may pass without the word *heirs*.—And it also does in certain conveyances where the word *heirs* hath been mentioned in antecedent deeds, to which they refer (9). 3d. In cases of nobility by writ, the peer hath an inheritance in his title, without the word *heirs*, unless specially provided against: But in creations by patent, which are *stricti juris*, the word *heirs* must be inserted, to make an inheritance. 4th. In grants of land to sole corporations and their *successors*, this word supplies the place of *heirs*. In grants in frank almoign, the word *frank almoign* supplies the place of the words *heirs* or *successors*, when made to a sole corporation: but in a grant of lands to a corporation aggregate, the word *successors* is not necessary, because such corporation never dies; therefore a life estate is as a perpetuity. 5th. A fee will pass to

(8) Co. Litt. 9, 10.

(9) Ibid.

the king without any words of inheritance, for the same reason.

Inheritances limited are of two sorts; *qualified* or *base fees*, and *fees conditional*, so called at common law; and afterwards *fee tail*, in consequence of *stat. de donis*; 13 Ed. I. c. 1.

A *qualified* or *base fee* has a condition subjoined, and must determine when the qualification ends; as if there be a grant to A. and his heirs, *tenants of the manor of Dale*, in this case when the heirs of A. cease to be tenants of that manor, the grant is defeated. — Yet it is a fee; for it may endure for ever.

A *conditional fee*, at the common law, was a fee restrained to some particular heirs; as to the heirs of a man's body; or the heirs male of his body. And such a gift was on condition that it should revert to the donor, if the donee had no heirs of his body. But so soon as he had issue born he might aliene his land, and thereby bar his own heirs and his donor's reversionary interest (10). It might be subject to forfeiture for treason, which it could not be until issue born for

(10) Co. Litt. 19. 2 Inst 233.

more than his life (11). He might charge the land with rents and certain other incumbrances, so as to bind his issue (12); however if he did not aliene, the course of descent was not altered by this performance of the condition, for if the issue had afterwards died, and then the tenant had died without making alienation, the land must revert to the donor; for which reason the donees of these conditional estates took care, as soon as they had issue, to aliene, and afterwards re-purchased the lands, which gave them a fee absolute.

Thus the old law stood in respect to such estates, 'till the stat. West. 2. *de donis*, 13 Ed. I. c. 1. and thus it yet stands in respect to annuities, and such like inheritance, as are not within that statute (13). This statute of *donis*, 13 Ed. I. enacts, that the will of the donor be observed, and that the tenement so given to a man and the heirs of his body, shall at all events go to the issue, if any; or if none, shall revert to the donor. On the construction of this statute, it was determined that the estate did not become absolute the instant any issue was born; but that it was divided into two parts, leaving

(11) Co. Litt. 19. 2 Inst. 234.

(12) Co. Litt. 19.

(13) 1 Inst. 19.

the donee a fee tail, and vesting in the donor the absolute fee, expectant on the failure of issue, which expectant estate is now called a reversion (14). *Tenements*, being the only word in the statute, nothing else can be *entailed*; which are all corporeal hereditaments whatsoever; as also such incorporeal ones as favour of the realty, or issue out of real ones; or which concern, or are annexed to, or may be exercised within the same, as rents, estovers, and the like.—Also all offices which concern land may be entailed (15). But mere personal chattels cannot be entailed; nor any office which relates to such personal chattels; nor any annuity which charges the person, but not the lands.—But in them, if granted to a man and the heirs of his body, the grantee hath a conditional fee, and may bar the reversion when he has issue (16). An estate to a man and his heirs for another's life cannot be entailed (17). Neither can a copyhold be entailed in virtue of the statute.—But by special custom of a manor, a copyhold may be limited to the heirs of the body (18).

(14) 2 Inst. 335.

(15) 7 Rep. 33.

(16) Co. Litt. 19, 20.

(17) 2 Vern. 225.

(18) 3 Rep. 8.

Estates tail, are either general, or special.

Tail general is where lands, &c. are given to a man and the heirs of his body begotten.

Tail special is where the gift is restrained to certain heirs of the donee's body; and this may happen where lands are given to a man and the heirs of his body, on Mary his now wife, to be begotten, and such like. The word *heirs* gives an estate in fee; but they being heirs to be by him begotten, makes a fee tail, and the person also being limited on whom such heirs shall be begotten, makes it a fee tail special.

ESTATES in *tail special* and *general* may be further diversified, by the distinction of the sexes.—As if lands be given to a man and the heirs *male* of his body begotten, then the heirs *female* shall not inherit, and so *vice versa*. For if the donee in tail male hath a daughter who dies, leaving a son, such grandson shall not inherit (19). If a man hath two estates *tail*; the one *male*, the other *female*, and he hath issue a daughter who hath issue a son; this grandson can succeed to neither estate (20).

(19) Litt. sect. 24.

(20) Co. Litt. 25.

As

As the word *heirs* is necessary to create a fee, so is the word *body*, or some other word of procreation, necessary to make a fee tail. If the words of inheritance or procreation are omitted, though the others are inserted, it will not make a fee tail.—As if a grant to a man and his issue of his body—to a man and his seed—to a man and his children; these are only estates for life, the words of inheritance, *heirs* being wanted (21). So if to a man and his heirs male or female, it is a fee simple, and not a fee tail, for want of words of procreation (22).

IN *last wills* indulgence is allowed, and an estate tail may be devised to a man and his seed; or to a man and his heirs male; or by other irregular modes of expression (23).

Frank-marriage is a species of estates tail, which, though out of use, yet are capable of subsisting in law. They are where tenements are given to a man with a wife, who is the cousin or daughter of the donor (24). In such a gift, though only the word *frank-marriage* be expressed, the donees shall have the tenements to them and

(21) Co. Litt. 20.

(22) Ibid. 27. Litt. sect. 31.

(23) Co. Litt. 9, 27.

(24) Litt. sect. 17.

the heirs of their two bodies begotten; that is, they are tenants in special tail; for the word *frank-marriage* does *ex vi termini*, not only create an inheritance, like word *frank-almoign*, but likewise limits that inheritance,—supplying both the words of descent and procreation. Such donees are liable to no service but fealty; for a rent reserved is void, until the fourth degree of consanguinity be past between the issues of the donor and the donee (25).

THE incidents to a tenant in tail, under the statute, are, 1. The tenant in tail may commit waste, by pulling down houses, felling timber, and the like. 2. That the wife shall have her dower of the estate tail. 3. That the husband of a female tenant in tail may be tenant by the curtesy to such estate. 3. That an estate tail may be barred by *fine* or *recovery*, or by lineal warranty, descending with assets to the heir (26).

By 32 H. VIII. c. 36. and 34 and 35 H. VIII. c. 20^a. all estates tail, created by the crown, and where the remainder or reversion continued still in the crown, are exempted from being barred by fine or reco-

(25) Litt. sect. 19, 20.

(26) Co. Litt. 224.

^a 10 C. I. sect. 2. c. 8. sect. 4.

very.

very. By 33 H. VIII. c. 39. sect. 75. all estates tail are rendered liable to be charged for payment of debts, due to the king by record or special contract. And by the bankrupt laws, stat. 21. Jac. I. c. 19^b. are subject to be sold. And by construction, 43 El. c. 4. an appointment by tenant in tail of the lands intailed to a charitable use, is good, without fine or recovery (27)^c. So that estates tail are now almost as unfettered, even before issue born, as they were at common law, after the issue was born.

^b 11 and 12 G. II. c. 8. sect. 3. continued by 17 and 18 G. III. c. 48. sect. 6.

(27) 2 Vern. 453.

^c 1 G. II. c. 15. tenant in tail, in possession, may endow any church, not having any glebe annexed with not more than forty acres, which shall be good against remainder and reversion, without fine or recovery.

C H A P. VIII.

Of Freeholds, *not of Inheritance.*

TH E S E are estates *for life* only; of which some are *conventional*, or CREATED BY ACT OF THE PARTIES: some are *legal*, or created by CONSTRUCTION OF LAW (1). Estates for life, *created by deed*, are *leases* made to a man for the term of his own life; or for that of another person; or for more lives than one. When the estate is held by the life of another, the tenant is called, tenant *pur auter vie* (2). The same solemnity of livery of seisin is necessary, as in a fee. They may be created by general grant, without defining any estate; as if A. grants to B. the manor of Dale; this makes him tenant for life (3). Such a grant, or a grant for life generally, shall be construed to be for the life of the grantee, if the grantor has authority to make such a grant (4); for all grants shall be taken most strongly against the grantor, except in case of the king (5). Such estate shall generally enure

(1) Wright 190.

(2) Litt. sect. 56.

(3) Co. Litt. 42.

(4) Ibid. 42.

(5) Ibid. 36.

so long as the life for which they are granted. Others shall *determine* on some future contingency before the life; as if granted to a woman during her widowhood; or to a man until he be promoted to a benefice; here, and in such cases, when the contingency shall happen, the estate shall cease (6); yet while they subsist, they shall be esteemed estates for life. If a man has an estate for his life generally, it shall determine by his civil death; for if he enters into a monastery, he is dead in law (7): therefore in grants it is usual to say, "for the term of "a man's natural life."

ESTATES for life, created by *construction of law*, viz. *tenant in tail, after possibility of issue extinct*. This happens where one is tenant in tail special, and the person from whose body the issue was to spring, dies without issue; or having left issue, that issue becomes extinct.—As where one has an estate to him and his heirs, on the body of his present wife, to be begotten, and the wife dies without issue. This estate must be created by the act of God; that is, by the death of the person out of whose body the issue was to spring. For if land be given to a man and his wife, and the heirs of

(6) Co. Litt. 42. 3 Rep. 20.

(7) 2 Rep. 48.

their

their two bodies to be begotten, and they are divorced *a vinculo matrimonii*, they shall neither of them have this estate, but be merely tenants for life (8). A possibility of issue is always supposed to exist until the parties are dead, even though they are an hundred years old (9).

THE incidents to an estate for life in either species of them, are, 1. Every tenant for life, unless restrained by covenant, may of common right take reasonable estovers and botes (10). But he is not permitted to cut timber, or do waste (11). 2. Tenant for life, or his representative, shall not be prejudiced by any sudden determination of his estate (12). Therefore if he sows his land, and dies before harvest, his executors shall have the *emblements* or profits of the crop; for the estate was determined by the act of God, and *actus Dei nemini facit injuriam*. So it is also, if a man be tenant *pur auter vie*, and the *cestuy qui vie* dies after the corn is sown, he shall have the emblements. The same is the rule if a life estate be determined by the act of law. Therefore if a lease be made to husband and wife,

(8) Co. Litt. 28.

(9) Ibid. Litt. sect. 34.

(10) Co. Litt. 41.

(11) Ibid. 53.

(12) Ibid. 55.

during coverture, and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*, he shall have the emblements (13). But if an estate for life be determined by the tenant's own act; as forfeiture for waste committed, and such like; the tenant shall not have the emblements, because he determined the estate by his own act (14). This doctrine extends to roots planted, or other annual artificial profits; but not to trees which are permanent (15). These advantages, by 28 H. VIII. c. 11*. are extended to parochial clergy. A third incident relates to under-tenants, who have the same and greater advantages than their lessors; they have the law of estovers and emblements, and even where the tenant for life shall not have the emblements, they shall.—As in case of a woman who holds *durante viduitate*; her taking husband is her own act, and therefore deprives her of the emblements; but if her under-tenant sows the land, and she then marries, he shall have the crop (16). By 11 G. II.* if the lessor dies, the under-tenant shall pay to the executors and administrators a rateable proportion of rent, from the last day of pay-

(13) 5 Rep. 116.

(14) Co. Litt. 55.

(15) Ibid. 1 Rol. abr. 728.

* Eng. stat. (16) Cro.

Eliz. 461. 1 Rol. abr. 727.
sect 1.

* 10 C. I. sess. 2. c. 5.

ment,

ment, to the death of the lessor. Besides those mutual privileges that tenants for life by deed, and those by construction of *law*, have: the latter has many privileges of tenants in tail; as not to be punishable for waste, &c (17). or, he is tenant in tail with many restrictions of tenant for life; as to forfeit his estate if he alienes in fee simple (18); whereas such alienation, if made by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner. This estate may be exchanged with a tenant for life.

TENANT, *by the curtesy of England*, is where a man marries a woman seized of lands in fee simple or fee tail, and has by her, issue, born alive, which is capable of inheriting her estate.—In this case, he shall, at her death, hold the lands for his life, by the curtesy (19)*. There are four requisites to make such estate. 1. *Marriage*, which must be canonical and legal. 2. The

(17) Co. Litt. 27. (18) Ibid. 28. (19) Litt. sect. 35, 52.

* This is of force in Ireland, by patent, 11 Henry III. worded thus; Cum consuetudo et lex Angliæ sit, quod si aliquis desponsaverit aliquam hæreditatem habentem, et ex ea prolem habuerit, cujus clamor auditus fuerit infra quatuor parietes, ut vir supervixerit uxorem, habebit totâ vitâ suâ custodiam hæreditatis uxoris, licet ea hæredem habuerit et primo viro qui plenæ ætatis est preceptum est, quod eadem lex observatur in Hibernia.

wife

wife must have had actual seisin of the lands; and therefore a man shall not be tenant by the curtesy of a remainder or reversion. But of some incorporeal hereditaments a man may be tenant by the curtesy, though there be no actual seisin of the wife; as an advowson, where the church did not become void in her life; because it is impossible she could have had it, and *impotentia excusat legem* (20). If the wife be an idiot, the husband shall not be tenant by the curtesy. 3. The issue must be born alive. It is not necessary that it is heard to cry; there may be other evidences of its being born alive (21). It must be born during the life of the mother; if the mother dies in labour, and the *Cæsarean* operation is performed, the husband shall not be tenant by curtesy (22). In gavel kind lands the husband may be tenant by the curtesy without issue (23). The issue must be capable of inheriting (24). Therefore if a woman be tenant in tail male, and has only a daughter, the husband shall not be tenant by curtesy (25). The time when the issue was born is immaterial, provided it was during the coverture; for whether it was born before or after the wife's seisin is immate-

(20) Co. Litt. 29.

(21) Dyer 25. 8 Rep. 34

(22) Co. Litt. 29.

(23) Ibid. 30.

(24) Litt. sect. 56.

(25) Co. Litt. 29.

rial; or whether it be living or dead, at the time of the seisin, or at the time of the wife's decease (26). The husband, by birth of the child, may do many acts to charge the lands; but the estate is not *consummate* until the death of the wife; which is the fourth requisite (27).

TENANT *in dower*, is where a husband dies seized of an estate of inheritance. In this case, the wife shall have a third part of the lands and tenements of which he was seized, during coverture, for her natural life (28). For this she must be actual wife, at the time of the husband's decease.—If she be divorced *a vinculo matrimonii*, she shall not be endowed (29). But a divorce *a mensa et thoro*, does not destroy dower (30). Yet, by 2 West. 13 Ed. I. c. 34. if a woman elopes from her husband, and lives with an adulterer, she shall lose her dower, unless he be reconciled to her. The wife of an idiot cannot be endowed. By 1 Edw. VI. c. 12. a wife shall be allowed her dower, though the husband was attainted of felony or treason: but, by 5 and 6 Ed. VI. c. 11^b.
the

(26) Co. Litt. 29. (27) Ibid. 30. (28) Litt. sect. 36.

(29) Braët. l. 2. c. 39. Co. Litt. 30. (30) Co. Litt. 32.

^b 28 H. VIII. c. 7. sect. 5. 33 H. VIII. sess. 1. c. 1. sect. 2. 27 El. c. 1. sect. 8. Widows of traitors are barred,
red,

the widows of traitors are barred, but not of felons. An alien cannot be endowed, unless a queen consort (31). The wife must be above nine years old at her husband's death, else she cannot be endowed (32). A wife may be endowed of all the estates of which her husband was seized in fee simple, or fee tail, at any time during the coverture, and of which any issue which she might have had might by possibility have been heir (33). Therefore if a man be seized in fee simple, and hath a son by a first wife, and after marries a second wife, she shall be endowed; for her issue might have been by possibility heir, on the death of the son by the former wife. But if a man be donee in tail spécial by a former wife, though such wife might be endowed; yet if she dies, and he marries again, his second wife shall not be endowed of these lands (34). A *seisin* in law of the husband, shall be as effectual as a *seisin* in deed to render the wife dowable (35). The *seisin* of the husband for a transitory instant only (as when by a fine, land is granted to

red, which is also the case at common law. Co. Litt. 406. Plow. 262. Eng. stat. 17 Ed. II. c. 16, gives the widows of felons their dower.

(31) Co. Litt. 31.

(32) Litt. sect. 36.

(33) Ibid. sect. 36, 53.

(34) Ibid. sect. 53.

(35) Co. Litt. 31.

a man,

a man, and he immediately renders it back by the same fine) will not entitle the wife to her dower (36). But if the lands abide in him a moment, the wife shall be endowed (37).—Yet a woman shall not be endowed of a castle built for defence of the realm (38), nor of common, without stint; for if the heir had a portion, and the widow another, the common would be doubly stocked (39). Copyhold estates are not liable to dower, except by special custom; and then it is called the widow's free bench (40). Where dower is allowable, the husband cannot aliene, but subject thereto^c (41). A woman may be endowed four ways. 1. By dower at *common law*, which is what is above described. 2. By *particular custom*; as where the wife shall have half the husband's lands, and such like (42). 3. *Ad ostium ecclesie* (43); as where tenant in fee simple, of full age, openly at the church door, endows his wife of the whole, or such part of his lands, as he pleases, specifying the same. 4. Dower *ex assensu patris* (44); as when the husband's father is alive, and the son, by his consent, expressly given, endows his wife with part

(36) Co. Litt. 31. Cro. Jac. 615. 2 Rep. 67.

(37) Cro. Eliz. 503. (38) Co. Litt. 31. 3 Lev. 401.

(39) Co. Litt. 32. 1 Jones 315. (40) 4 Rep. 22.

^c 9 W. III. c. 36. sect. 4. (41) Co. Litt. 32.

(42) Litt. sect. 37. (43) Ibid. 39. (44) Ibid. 40.

of his father's lands. The only method now used to *endow a woman*, is by common law; and it was provided by 1st charter of Henry I. and by magna charta, c. 7. which declares, that a widow shall pay nothing for her marriage to the lord, nor shall be constrained to marry again; that she shall remain in her husband's capital demesne house forty days after his death; in which time her dower shall be *assigned*. The lands must be assigned by the heir, or his guardian (45). The widow is immediate tenant to the heir. If the heir or guardian do not assign the dower within the forty days, or if it be assigned unfairly, she shall have remedy at law, and the sheriff is to assign it (46). If the heir or guardian assign too much, it may be afterward remedied by writ of *admeasurement* (47). If the thing be divisible, it must be set out by metes and bounds; if not, she must be endowed specially; as of the third presentation to a church, the third part of the profits of an office, and the like (48). A widow may be *barred of dower*, not only by any of the ways before-mentioned, but also by detaining the title deeds, until she restores them (49).— And by stat. 6. Ed. I. c. 7. of Glocester, if

(45) Co. Litt. 34, 35. (46) Ibid. (47) F. N. B. 148. Finch law, 314. Stat. West. 2. 13 E. I. c. 7.

(48) Co. Litt. 32.

(49) Ibid. 39.

ſhe aliene the land aſſigned for her dower, ſhe forfeits it *ipſo facto*, and the heir may recover by action. So if ſhe levies a fine, or ſuffers a recovery of the lands, during her coverture (50)^d. But the moſt uſual method to bar a dower, is by *jointure*, as regulated by 27 H. VIII. c. 10^e. commonly called ſtat. of uſes; which is a joint eſtate limited to huſband and wife, of lands and tenements, to take effect in profit and poſſeſſion, preſently after the death of the huſband, for the life of the wife at leaſt. By the ſame ſtatute, it is provided, that ſuch eſtate in jointure to the wife *before marriage*, ſhall preclude her from dower (51). The four following requiſites muſt be obſerved; 1. The jointure muſt take effect immediately on death of the huſband. 2. It muſt be for her life at leaſt. 3. It muſt be made to herſelf, and not in truſt. 4. It muſt be made and expreſſed in the deed, to be in ſatisfaction of dower. If the jointure be made after marriage, ſhe has her election at his death, to accept or reſuſe it, and take her dower. And if, by fraud or accident, it is created out of a bad eſtate, and ſhe is evicted, ſhe ſhall have her dower *pro tanto*.

(50) Pig. of recoveries, 66.

^d 10 C. I. ſeſſ. 2. c. 8. ſeſt. 8. if ſuffered by covin.

• 10 C. I. ſeſſ. 2. c. 1. ſeſt. 6.

(51) 4 Rep. 1, 2.

Tenants in dower are not liable to pay taxes or tolls, and the king cannot distrain for his debt out of her estate, which is almost the only one that can be instanced. But the debt must be contracted during coverture, to exempt it from the king's debt (52). A widow may enter on her jointure lands, without formal process: whereas a very tedious method of proceeding is necessary to compel a legal assignment of dower (53). And though dower may be forfeited by the treason of the husband, yet the jointure remains unimpeached to the widow (54).

(52) Co. Litt. 31. F. N. B. 150. (53) Co. Litt. 36.

(54) Ibid. 37.

C H A P. IX.

Of Estates, less than Freehold.

OF these there are three sorts. 1. *Estate* for *years*, which is a contract for the possession of land, &c. for a determinate period. If the lease be but for a half or quarter of a year, or any less time, the lessee is respected as tenant for years; a year being the shortest term which the law in this case notices (1). A *year* is three hundred and sixty-five days; for though every *leap year* hath three hundred and sixty-six days, yet by 21 H. III. st. 1. the increasing and preceding day shall be reckoned as one. A month is more ambiguous, being either lunar, consisting of twenty-eight days; thirteen of which make a year: or calendar, whereof in a year there are twelve. A *month*, in law, is a lunar month; therefore a lease for twelve months is only for forty-eight weeks: but if it be for a twelve month, it is good for the whole year (2); in a day the twenty-four hours are reckoned (3):—

(1) Litt. sect. 67.

(2) 6 Rep. 61.

(3) Co. Litt. 135.

there-

therefore if I am bound to pay a debt on a certain day, I discharge the obligation if I pay it before twelve o'clock at night. Every estate which must expire at a fixed period, by what words soever created, is an *estate for years*; and therefore commonly called a term. If a man grants a lease to another for so many years as A. shall name, it is a good lease for years (4), for *id certum est, quod certum reddi potest*. If no day of commencement be named, it begins from the delivery of the lease (5). A lease for so many years as A. shall live is void from the beginning, for it can never be reduced to a certainty. A lease for twenty years, if A. shall live so long, is good (6). A lease for years may commence *in futuro*, tho' a lease for life cannot. If A. grant lands to B. to hold from Michaelmas next, for twenty years, it is good.—But to hold from Michaelmas next, for his life, is bad. For a lease for life cannot be given now, of an estate to commence *in futuro* (7). But livery is not necessary to a lease for years; therefore such lessee is not said to be seized: nor does the lease give him any more than a right to entry, which right is called his interest in the term; but when he enters, and not before,

(4) 6 Rep. 35.

(6) Ibid. 45.

(5) Co. Lit. 46.

(7) 5 Rep. 94.

he is possessed, not of the land, but of a term of years (8); the possession or seisin still remaining in him who hath the freehold. The term may expire before the time. If I grant a lease to A. for the term of three years, and after the expiration of said term to B. for six years, and A. surrenders or forfeits his lease at the end of one year, B's interest shall immediately take effect: but if the remainder hath been to B. after the expiration of the said three years, or from and after the expiration of said time; in this case, B's interest will not commence till the time is fully elapsed (9). Tenant for years hath, inseparable to his estate (unless by special agreement) the same estovers which tenant for life is intitled to (10).—See chap. 8. of this book. Where the term for years depends on a certainty, and in the last year the tenant sows the ground, and the corn is not ripe when the term is expired, the landlord shall have it (11). But where the lease depends on an uncertainty, as on the death of the lessor, being himself only tenant for life; or being a husband seized in right of his wife; or if a term for years depends on a life or lives; in all these cases, the estate for years not

(8) Co. Litt. 46.

(9) Ibid. 45.

(10) Ibid.

(11) Litt. sect. 68.

being

being to expire at a time foreknown, the tenant, or his executors, shall have the *em-blements*, as a tenant for life, or his executors (12): but not so, if it determine by the act of the party himself; as if tenant for years does any thing that amounts to a forfeiture (13).

THE second species of estates, not freehold, are at *will*; as where lands are let from one man to another, at the will of the lessor, and the tenant, by force of this lease, obtains possession (14). The tenant cannot assign this interest, for the lessor may *determine his will* when he pleases. But every estate at will, is at the will of both parties, so that either may determine the estate (15). Yet if the tenant at will sows his land, and the landlord puts him out before the corn is reaped, yet the tenant shall have the emblements and free ingress, regress, and egress, to cut and carry the profits away (16). But it is otherwise when the tenant determines the will (17). Besides the express determination of the lessor's will, that the lessee shall hold no longer (which must either be made on the land (18), or notice

(12) Co. Litt. 56.

(14) Litt. sect. 68.

(16) Ibid. 56.

(18) Co. Litt. 55.

(13) Ibid. 55.

(15) Co. Litt. 55.

(17) Ibid. 55.

must be given to the lessee (19), the exertion of any act of ownership by the lessor; as entering and cutting timber (20); taking a distress for rent, and impounding it thereon (21); or making a feoffment or lease for years of the land, to commence immediately (22); any act of desertion by the lessee, as assigning to another (23); or *instar omnium*, the death or outlawry of either lessor or lessee, puts an end to the estate at will (24). The lessee shall have reasonable ingress and egress, to carry away his goods and utensils (25). If rent be paid half yearly, or quarterly, and the lessee determines his will, the rent shall be paid to the end of the current half year or quarter (26). Courts have held demises where no term is mentioned, rather as terms from year to year, so long as both parties please, than tenancies at will, especially when an annual rent is reserved, and will not suffer either party even at the end of the year to determine the tenancy, without reasonable notice to the other.

Copyholds are tenancies at will, though by custom, they are now no longer arbitrary, or at the will of the lord, but fixed

(19) 1 Vent. 248. (20) Co. Litt. 55. (21) Ibid. 57.

(22) 1 Rol. abr. 860. 2 Lev. 88. (23) Co. Litt. 55.

(24) Ibid. 57, 62. 5 Rep. 116. (25) Litt. sect. 69.

(26) Salk. 414. 1 Sid. 339.

and ascertained. A copyhold tenant therefore is as much tenant by custom, as at will. He may in many manors be tenant in fee simple, in fee tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition, subject to be deprived by those circumstances which, by immemorial custom, have been declared to be a forfeiture; as in some manors, the want of issue male, in others, cutting down timber, and the like. Yet none of these interests amount to freehold; that abides in the lord (27). But with regard to copyholders, who are not said to hold *at the will of the lord*, but according to the custom of the manor (28), the law supposes the freehold to vest in the tenants, and not in the lord, who are sometimes called *customary freeholders*, having a freehold interest, though not a freehold tenure.

3d. AN *estate at sufferance* is where one comes in by lawful title, but keeps it afterwards without any title at all.—As if a man takes a lease for a year, and at the expiration of the year, continues to hold it with-

(27) Litt. sect. 81. 2 Infl. 325.

(28) Fitz. abr. tit. coronæ 310. custom. 12. Bro. abr. tit. custom. 2. 17. tenant per copie. 22. 9 Rep. 76. Co. Litt. 59. Co. copyh. sect. 32. Cro. Car. 229. 1 Rol. abr. 562. 2 Vent. 143. Carth. 432. Lord Raym. 1225.
out

out any fresh leave; or if a man maketh a lease at will, and dies, the estate is thereby determined; but if the tenant continueth possession, he is tenant at sufferance. No man can be tenant at sufferance against the king; but his tenant so holding over is an absolute intruder. In case of a subject this estate may be destroyed when the owner shall make an actual entry and oust the tenant; before entry he cannot maintain an action of trespass against the tenant, as against a stranger (29). By 4 G. II. c. 28^a. any tenant for life or years, or other person claiming under, or by collusion, with such tenant, who shall wilfully *hold over* after the determination of his term, and demand made, by the reversioner in writing, of the possession, shall, for the time he continues, pay double the yearly value of the lands so detained^b.

(29) Co. Litt. 57.

^a 11 Ann. c. 2 sect. 1.

^b So also (in England) if the tenant holds over after *he* gives notice to quit, he shall be liable to double rent, by 11 G. II. c. 19. in the same manner as he would have been, if the landlord had given notice, under 4 G. II. c. 28. above-cited. So guardians and others having estates for life, are guarded against, in England, by 6 Ann. c. 8. sect. 1.

C H A P. X.

Estates on Condition.

CONDITIONAL estates are, 1. Implied. 2. Expressed, under which last may be included, 3. Estates in vadio, gage, or pledge. 4. Estates by statute merchant, or statute staple. 5. Estates by elegit.

ESTATES *on condition implied* in law, is where a grant has a condition inseparably annexed, although not expressed.—As if a grant be made to a man of an office, the law tacitly annexes a secret condition that the grantee shall duly execute it (1), else it is lawful for the grantor and his heirs to oust him (2). An office, either public or private, may be forfeited by mis-user or non-user. By *mis-user*, or abuse; as if a judge takes a bribe. *Non-user*, or neglect; which, in public offices that concern the administration of justice, is a direct *forfeiture*.—But non-user of a private office is no cause of forfeiture, unless some special damage be proved (3). Franchises also are held to

(1) Litt. sect. 378. (2) Ibid. 379. (3) Co. Litt. 233.
be

be granted on the same condition of making a proper use of them, and may be forfeited by abuse or neglect (4). If tenants for life enfeoff a stranger in fee simple, this is a forfeiture of their several estates, being a breach of an implied condition, that they shall not attempt to create a greater estate than they are entitled to (5).—So, if tenant for life or years commits felony.

2d. ESTATES *upon condition expressed*, is where an estate is granted in fee simple, or otherwise, with an express qualification annexed, whereby the estate granted, shall be enlarged, commence, or be defeated on performance or breach of this qualification (6). These conditions are precedent, or subsequent. *Precedent*, as if an estate for life be limited to A. on his marriage with B. the marriage is precedent, and no estate shall vest in A. until the condition is performed (7). But if a man grant an estate in fee simple, reserving to him and his heirs a certain rent, and that if it remains unpaid at such a time, it shall be lawful for him to re-enter and possess it; here is an estate on condition *subsequent*, which is defeasable if the condition is not performed (8). So if a personal

(4) 9 Rep. 50. (5) Co. Lit. 215. (6) Ibid. 201.

(7) Show. parl. cas. 83, &c. (8) Litt. sect. 325.

annuity

annuity be granted at this day to a man, and the heirs of his body, it remains a fee simple, on condition that he has heirs of his body. On the same principle depend all the determinable estates mentioned in ch. 8. of this book. There is a distinction between a *condition in deed* and a *limitation*, which is denominated a *condition in law*. When an estate is so expressly confined by the words of its creation, that it cannot endure longer than until the contingency happens, this is denominated a limitation; as when lands are granted to a man while he continues unmarried, until, out of the rents, he shall have made five hundred pounds, and the like (9): in such cases the estate determines as soon as the contingency happens; and the next estate which depends on such determination, immediately vests without any act to be done by him in expectancy. But when an estate is strictly speaking a condition in deed; as if on condition to be void on payment of five hundred pounds; or so that the grantee continues unmarried (10); the law permits it to endure beyond the time when such contingency happens, unless the grantor, his heirs or assigns, take advantage of the breach of condition, and make either an

(9) 10 Rep. 41.

(10) Ibid. 42.

entry or claim to avoid the estate (11).— But though strict words of condition be used in the creation of the estate, yet, if on breach of condition, the estate is limited to a third person, (as if an estate be granted by A. to B. on condition that within two years B. intermarry with C. and on failure thereof to D. and his heirs) this is a limitation, and not a condition (12); because if it was a condition, on breach thereof, only A. or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglect: but when it is a limitation, the estate of B. determines, and D's commences the instant the failure happens.—So, if a man devise lands to his heir at law, on condition that he pays a sum of money, and for non-payment devises it over; this is a limitation, else no advantage could be taken of the non-payment; for none but the heir could have entered for breach of the covenant (13).

THESE express conditions, if they are impossible at their creation, or afterwards become impossible, by the act of God, or of the feoffor, or contrary to law, or *repug-*

(11) Litt. sect. 347. St. 32. H. VIII. c. 24.

(12) 1 Vent. 202.

(13) Cro. Eliz. 205. 1 Rol. abr. 411.

nant to the nature of the estate, are void. In any of which cases, if the conditions are to be performed after the estate is vested, it shall become absolute in the tenant; as if a feoffment be made to a man in fee, on condition, that unless he goes to Rome in twenty hours; or marries with J. S. by such a day, within which day the woman dies, or the feoffor marries her; in any of such cases, the estate shall be vacated: here the condition is void, and the estate made absolute in the feoffee (14).—But if the condition be precedent, or to be performed before the estate vests; as if a grant to a man, that if he goes to Rome in a day, he shall have an estate in fee; here the void condition being precedent, the estate which depends thereon is also void (15).

3d. ESTATES in *vadio*, *gage*, or *pledge*, which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or mortgage.

Vivum vadium, is when a man borrows a sum of another, and grants him his estate, to hold till the rents and profits shall repay the sum borrowed. In this case, the land survives the debt, and immediately, on discharge, results to the borrower (16).

(14) Co. Litt. 206. (15) Ibid. (16) Ibid. 205.

Mortuum vadium, or *mortgage*, is where a man borrows of another a specific sum, and grants him his estate in fee, on condition, that if he repay the mortgagee the like sum on a certain day mentioned in the deed, then he shall re-enter on the estate so mortgaged; or that the mortgagee shall re-convey it to the mortgagor: in this case, the land is, by law, in case of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's estate is no longer conditional, but absolute; but whilst it remains conditional, the mortgagee is called tenant in mortgage (17). It is most usual to grant only a long term of years, by way of mortgage, with condition to be void on repayment. As soon as the estate is created, the mortgagee may enter on the lands, but is liable to be dispossessed on payment of the money at the day limited; therefore the usual way is to agree that the mortgagor shall hold the land until the day assigned for payment; when, in case of failure, the estate becomes absolute, and the mortgagee may take possession without any possibility at law of being evicted. But a court of equity will allow the mortgagor, at any reasonable time, to recall or redeem his estate, paying the mortgagee

(17) Litt. sect. 332.

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his principal, interest, and expences. This is called the *equity of redemption*; and enables a mortgagor to call on a mortgagee who has possession of his estate, to deliver it back, and account for the rents and profits received, on payment of his whole debt and interest. On the other hand, the mortgagee may compel the sale of the estate, in order to get the whole of his money; or else call on the mortgagor to redeem his estate; or in default thereof, to be for ever *foreclosed* from redeeming the same. Also in some cases of fraudulent mortgages, 4 and 5 W. and M. c. 16^a. the fraudulent mortgagor forfeits all equity of redemption. By 7 G. II. c. 20. after payment or tender by the mortgagor, of principal, interest and costs, the mortgagee can maintain no ejectment, but may be compelled to re-assign his securities^b.

4th. A FOURTH species of estates defeasible on condition subsequent are those held by *statute merchant* and *statute staple*; both which are securities entered into for money,

^a 9 W. III. c. 36. sect. 1, 2.

^b 11 and 12 G. III. c. 10. sect. 1. When one year and a half's interest is due, a court of equity will, on petition, appoint a receiver to receive the rents of such part of the mortgaged premises, as will be sufficient to pay the arrears, and the accruing interest.

the one pursuant to 13 Ed. I. *de mercatoribus*, and thence called statute merchant; the other, 27 Ed. III. c. 9. before the mayor of the staple, or grand mart of the principal commodities of the kingdom. They were originally permitted among traders only; whereby the lands of the debtor are conveyed to the creditor, till, out of the rents and profits, his debt is satisfied: and during that time the creditor is tenant, by statute merchant or statute staple. There is another security, the *recognizance* in nature of a statute staple, which extends the benefit of this mercantile transaction, to all the king's subjects, by 23 H. VIII. c. 6.

5th. ANOTHER species of conditional estates is by *elegit*. It is a writ founded on 13 Ed. I. c. 18. by which, after the plaintiff has received judgment for his debt at law, the sheriff gives him possession of half of the defendant's lands and tenements; to be held until his debts and damages are paid; and he is called tenant by *elegit*.*

By 13 Ed. I. the whole of a man's lands were liable to be pledged in a statute mer-

* By the execution of *elegit* the creditor gains only a legal title to the lands of his debtor, and he must bring an ejectment, in order to obtain the actual possession.

chant,

chant, for a debt contracted in trade, tho' only half was liable to be taken in execution for any other debt. These estates shall go to executors, altho' they may be estates of inheritance: for the tenants have but a similitude of a freehold, and *nullum simile est idem*.

IF lands are devised to a man's executors until, out of the rents, the debts due by the testator shall be discharged, the interest shall go to the executors of the executors of the former devisor (18).

(18) Co. Litt. 42.

CHAP.

C H A P. XI.

Of Estates in *Possession*, *Remainder*, and
Reversion.

ESTATES in *possession*, are such as we have treated of in the foregoing chapter.

AN estate in *remainder* is to take effect, and be enjoyed after another estate is determined.—As if a man, seized in fee, granteth lands to A. for twenty years, and after, to B. and his heirs for ever; here A is tenant for years, remainder to B. in fee. Yet both these interests are but one estate (1). So if land be granted to A. for twenty years, and after the determination of that term to B. for life, and after the determination of B's estate for life, it is limited to C. and his heirs for ever. Here B. is tenant in remainder for life; and the whole remains in C. and his heirs; yet they are all but one estate,—upon a mathematical principle, that all the parts are equal, and no more than equal, to the whole. No remainder can therefore be limited after a fee simple (2); for a residuary part cannot be reserved after the whole

(1) Co. Litt. 143.

(2) Plowd. 29. Vaugh. 269.

is disposed of. To create a remainder, there must be some *particular estate* precedent to the remainder (3); as an estate to A. for years, remainder to B. in fee; or an estate for life to A. remainder to B. in tail. An estate to commence at a distance of time, without any intervening one, is no remainder.—And such future estates can only be made of chattel interests (4); but no estate of freehold can be created to commence *in futuro*, because no freehold could pass without livery of seisin, which must operate either immediately or not at all. So when it is intended to grant a freehold, whereof the enjoyment shall be deferred until a future time, there must be a particular estate created, that may subsist until that time is completed, and the grantor must deliver immediate possession of the land to the tenant of the particular estate, which is construed to be giving possession to him in remainder.—As where one leases to A. for three years; remainder to B. in fee, and makes livery of seisin to A.; here, by the livery, the freehold is immediately created and vested in B. during A's term. The whole estate passes, and the remainder man is seized of the remainder at the same time that the termor is seized of his term. It is

(3) Plowd. 25. Co. Litt. 49. (4) Raym. 151.

an estate commencing *in presenti*, to be enjoyed *in futuro*. This particular estate is said to support the remainder.—But a lease at will, is not such a particular estate as will support a remainder (5). For in a freehold remainder, livery of seisin must be given at its creation, and this entry would determine the estate at will (6). Or if it be a chattel interest, though, perhaps it might operate as a future contract, if the tenant for years be a party to the deed of creation, yet it is void by way of remainder; for it is a separate contract, distinct from the estate at will; and every remainder must be part of one and the same estate out of which the particular estate is taken (7). And if the particular estate is void in its creation, or is defeated afterwards, the remainder is void (8).—As where the particular estate is for the life of a person not *in esse* (9): or an estate for life on condition, which the tenant breaks, and the grantor enters and avoids the estate (10), the remainder is void. The remainder must pass out of the grantor at the creation of the particular estate (11)—As where an estate to A. for life, remainder to B. in fee; here B's remainder passes

(5) 8 Rep. 75.

(7) Raym. 151.

(9) 2 Rol. abr. 415.

(11) Plowd. 25.

(6) Dyer 18.

(8) Co. Litt. 298.

(10) 1 Jones 58.

from

from the grantor at the same time with A's seisin. If it be limited on an estate for years, the lessee for years must have livery (which is not necessary to strengthen his estate) else the remainder is void (12).—The remainder must vest in the grantee, during the continuance of the particular estate, or *eo instanti* that it determines (13). If an estate be limited to A. for life, remainder to the eldest son of B. in tail, and A. dies before B. hath any son, the remainder will be void. For there can be no intervening estate between the particular one and the remainder (14).

REMAINDERS are vested, or contingent. Vested remainders, or *remainders executed*, are where they are invariably fixed, to remain to a determinate person, after a particular estate.—As to A. for twenty years, remainder to B. in fee; here B's is a *vested* remainder.

CONTINGENT, or *executory remainders*, are where the remainder is limited to take effect, either to a dubious and uncertain person; or on a dubious and uncertain event. So that the particular estate may determine,

(12) Litt. sect. 60.

(13) Plowd 25. 1 Rep. 66.

(14) 3 Rep. 21.

and the remainder never take effect (15): First, to a dubious and uncertain person; as if A. be tenant for life, remainder to B's eldest son in tail (then unborn); this is a contingent remainder; for it is uncertain whether B. will have a son or no. But the instant the son is born, it is vested. If A. had died before the contingency happened, the remainder would be gone. But, by 10 and 11 W. III. c. 16^a. *posthumous children* (where the father is tenant for life, remainder to his own children in tail, and he dies, leaving his wife *enfeint*) shall be capable of taking in remainder. This species of contingent remainders to a person not in being, must be limited to some one, that may, by common possibility, be *in esse*, before the particular estate determines (16); as if an estate be made to A. for life, remainder to the heirs of B.; if A. dies before B, the remainder is at an end; for B. had no heirs during his life, *nemo est hæres viventis*.—But if B. dies first, the remainder is vested in the heir who is entitled at A's death.—This is a good contingent remainder (17). But a remainder to the right heirs of B. (if no such person as B. is *in esse*) is void (18). For here are two con-

(15) 3 Rep. 20.

^a 8 Ann. c. 4. sect 1.

(16) 2 Rep. 51.

(17) Co. Litt. 378.

(18) Hob. 33.

tingencies which make it *potentia remotissima*. A remainder to a man's eldest son is good; but if it be limited to his son John, or Richard, it is bad, if he has no son of that name; it is too remote a possibility that he shall have a son who shall have a particular name (19). A limitation of a remainder to a bastard before he is born, is not good (20). A remainder may also be *contingent*, when the event, on which it is to take effect, is vague and uncertain; as where land is given to a man for life, and in case B. survives him, then with remainder to B. in fee; here B. is a certain person, but the remainder is contingent; during the joint lives of A. and B. it is contingent; and if B. dies first, it can never vest in his heirs, but is gone; but if A. dies first, it is vested.

CONTINGENT remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any estate less than freehold. Thus, if land be granted to A. for ten years, remainder in fee to the right heirs of B. it is void (21).—But if granted to A. for life, with like remainder, it is good.

(19) 5 Rep. 51.

(21) 1 Rep. 130.

(20) Cro. Eliz. 509.

CONTINGENT remainders may be defeated, by determining the particular estate before the contingency happens (22), whereby they become vested. Thus when there is tenant for life, with divers remainders in contingency, he may not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate, before any other of the remainders vest, by which he utterly defeats them.—As if there be tenant for life with remainder to his eldest son, unborn, in tail; and the tenant before any son is born, surrenders his life estate; he, by that means, defeats the remainder in tail to his son. In these cases, it is necessary to have *trustees* appointed to preserve the contingent remainders, in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his determines; and thus supports the contingent remainders.

IN devises, by will, remainder may be created in some measure contrary to the rules before laid down, but they are not strictly remainders, but executory devises.

AN *executory devise* is such a disposition of lands, that thereby no estate vests at the

(22) 1 Rep. 66, 135.

death of the devisor, but only on some future contingency. It differs from a remainder in three particulars. 1st. It needs no particular estate to support it; as when a man devises a future estate to arise upon a contingency, and till that happens, does not dispose of the fee simple, but leaves it to descend to his heirs at law.—Or when one devises lands to a *feme sole*, and her heirs, upon her day of marriage; here is a contingent remainder without any particular estate to support it.—A freehold commencing *in futuro*. This limitation, tho' void in a deed, is good in a will (23). Such an executory devise cannot be barred by a recovery, before it commences (24). 2nd. By executory devise, a fee may be limited after a fee; as where a devisor devises his whole estate in fee, but limits a remainder thereon, to commence on a future contingency; as if a man devises land to A. and his heirs, but if he dies before twenty one years, then to B. and his heirs. This remainder, though void in a deed, is good by way of executory devise (25). But in both these species of executory devises, the contingencies ought to be such as may happen in a reasonable

(23) 1 Sid. 153.

(24) Cro. Jac. 593.

(25) 2 Mod. 289.

time,

time, as within one or more life or lives in being, or a moderate term of years. The utmost that has hitherto been allowed for such contingency to happen in, is that of a life or lives in being, and twenty-one years after.—As when lands are devised to such unborn son of a *feme covert* as shall first arrive at twenty-one years, and his heirs; the utmost time that can happen before the estate can vest, is the life of the mother, and the subsequent infancy of her son (26). 3d. By executory devise, a term of years may be given to one man for life, and afterward limited over to another in remainder; whereas, by deed, the grant to a man for life, is a total disposition of the whole term; but it is now determined, that in such executory devises, all the remainder men shall be *in esse*, during the life of the first devisee (27).

A REVERSION is the residue of an estate, left in the grantor, to commence after the determination of some particular estate granted out by him (28).—As if a gift in tail, the reversion of the fee is without any special reservation vested in the donor, by act

(26) 12 Mod. 287. 1 Ventr. 164. (27) Skin. 341.
3 P. Wms. 258. (28) Co. Litt. 22.

of law. A reversion is never created by deed, but by act of law. A remainder can never be limited, but by deed or devise,—Both are equally transferable, being estates *in presenti*, taking effect *in futuro*. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent by special words. But by a general grant of the reversion, the rent will pass, though, by a general grant of the rent, the reversion will not pass,—“*accessorium non ducit, sed sequitur, suum principale*” (29). If one, seized of a paternal estate in fee, makes a lease for life, remainder to himself and heirs; this is a reversion (30), to which rent and fealty shall be incident, and shall *only* descend to the heirs of his father’s blood, and not to his heirs general, as a remainder, limited by a third person would have done (31). So if a man makes a lease to A. for life, reserving rent, with reversion to B. and his heirs; B. hath a remainder descendable to his heirs general, and not a reversion, to which the rent is incident, but the grantor shall be intitled to the rent during the continuance of A’s estate (32).

(29) Co. Litt. 151, 152.

(30) Cro. Eliz. 321.

(31) 3 Lev. 407.

(32) 1 And. 23.

By 6 An. c. 18^b. all persons on whose lives any lands or tenements are holden, shall (on application to chancery, and order made thereon) once in every year, if required, be produced to the court, or its commissioners; or on neglect or refusal, they shall be taken to be dead, and the person intitled to any expectant estate thereon, may enter and hold the land, &c. until the party shall appear to be living.

WHERE a greater and less estate coincide in the same person, without any intermediate estate (33), the less is immediately annihilated, or *merged*, in the greater.— Thus if there be tenant for years, and the reversion in fee descends to, or is purchased by him, the term is merged in the inheritance, and shall never exist more. But they must come to the same person in the same right. If the freehold be in his own right, and he has a term in right of another, it is

^b 7 W. III. c. 8. sect. 1, 3. If they shall remain beyond sea, or absent themselves seven years together, and no sufficient proof made of their being alive, on an action commenced to recover the tenement, they shall be considered as dead. And if such person shall return on a future day, and shall prove his existence, the party evicted, or his executors, &c. may re-enter and enjoy the lands, so long as such person shall live; and shall recover the profits from the time of such conviction.

(33) 3 Lev. 437.

no

no merger. If tenant for years dies, and makes the reversioner in fee, his executor, whereby the term vests also in him, it shall not merge. So, if he who hath the reversion marries the tenant for years (34). An estate tail, and a reversion, may be in a man, both in his own right, yet there shall be no merger (35).

(34) Plowd. 418. Cro. Jac. 275. Co. Litt. 338.

(35) 2 Rep. 61. 8 Rep. 74.

C H A P. XII.

Of Estates in *Severalty*, *Joint-tenancy*, *Coparcenary*, and *Common*.

ESTATES in *severalty* are such as are held by a person in his own right without any other person being connected with him.

AN estate in *joint-tenancy*, is where lands are granted to two or more to hold in fee simple, fee tail, for life, years, or at will. It is created by the wording the deed or devise, by which the tenants claim, and can only arise by act of the parties, and never by act of law. If an estate be given to a plurality of persons without any restrictive, exclusive, or explanatory words; as if to A. and B. and their heirs; this makes them joint-tenants.

THE properties of this estate are derived from its *unity*, which is fourfold.

1st. *Unity of interest*. One joint-tenant cannot have one period of duration or quantity of interest, and the other, a different;
one

one cannot be tenant for life, another for years; one cannot be tenant in fee, the other in tail (1). If lands be limited to A. and B. for their lives, they are joint-tenants of the freehold. If to A. and B. and their heirs, they are joint-tenants of the inheritance (2). If to A. and B. and the heirs of A.; A. and B. are joint-tenants of the freehold, and A. has the remainder in severalty. If to A. and B. and the heirs of the body of A. they have a joint estate for life; and A. hath a several remainder in fee-tail (3).

2nd. THERE must be *unity of title*. It must be created by the same act, of grant, &c. or by one and the same seisin (4). It cannot arise by act, or descent of law,

3d. THERE must be *unity of time*. It must be vested at the same period,—As an estate made to A. and B. or a remainder in fee to A. and B. after a particular estate. But if, after a lease for life, the remainder be limited to the heirs of A. and B. and during the continuance of the particular estate, A. dies, which vests the remainder of one moiety in his heir, and then B. dies, which vests the other moiety in his heir; here A. and B's heirs

(1) Co. Litt. 188.

(2) Litt. sect. 277.

(3) Ibid. 285.

(4) Ibid. 278.

are

are not joint tenants, but tenants in common (5). It has been held, that in a feoffment made to the use of a man, and such wife as he should afterwards marry, for the term of their lives, gives them a joint estate (6); because the wife's estate was only in abeyance till they married.

4th. THERE must be *unity of possession*.—They are seized *per my et per tout*. Each has the entire possession, as well of any parcel, as of the whole (7). One cannot be seized of one acre, and the other of another. If two joint tenants let a verbal lease of the lands, reserved rent to be paid to one, it shall enure to both (8). If their lessee surrenders his lease to one, it is a good surrender to both (9). The re-entry of one, is as effectual as of both (10). They cannot sue, or be sued, separately, respecting their joint estate (11). If two joint tenants are possessed of an advowson, and they present different clerks, the bishop may refuse to admit either; and if they do not agree within six months, he may present by lapse. But if he pleases he may admit a clerk presented by either. If the clerk of one joint

(5) Co. Litt. 188.

(6) Dyer 340. 1 Rep. 101.

(7) Litt. sect. 288. 5 Rep. 10. (8) Co. Litt. 214.

(9) Ibid. 192.

(10) Ibid. 319, 364.

(11) Ibid. 195.

tenant

tenant shall be admitted, this shall keep up the title in both (12). One joint-tenant cannot have an action for trespass against the other, in respect of the lands (13). One is not capable to do any act to defeat or injure the estate of the other; as to let leases (14). Livery of seisin made to one, shall enure to both. One may have an action against the other, for any waste done to the inheritance, by 2 West. c. 22. By 4 An. c. 16^a. one may have action of account against another, for receiving more than his share of the profits. The entire tenancy, on the decease of one, remains to the survivors; and at length to the last *survivor*; and he shall be entitled to the whole estate, be it of what nature it may (15). The king (16), or a corporation (17), cannot be joint tenants with a private person; because, as they can never die, there cannot be any *jus accrescendi* in the private person.

THIS estate may be *severed* by destroying any of its unities. 1st. That of time, respecting only its commencement, cannot be affected by any subsequent transaction.

(12) Co. Litt. 185.

(13) 3 Leon. 262.

(14) 1 Leon. 234.

^a 6 An. c. 10. sect. 28.

(15) Litt. sect. 280, 281.

(16) Co Litt. 190. Finch.

l. 83.

(17) 2 Lev. 12.

2nd. It may be destroyed without alienation, by disuniting their possession. If two joint tenants agree to part their lands, they are no longer joint tenants; and by this, the right of survivorship is destroyed (18). By 31 H. VIII. c. 1. 32 H. VIII. c. 32^b. joint tenants are compellable, by writ of partition, to divide their lands. 3d. It may be destroyed, by destroying the unity of title.—As if one alienes, and conveys to a third person; it is then turned into a tenancy in common (19). 4th. It may be destroyed, by destroying the unity of interest. If there be two joint tenants for life, and the inheritance is purchased by, or descends on either, it is a severance of the jointure (20). Tho' if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure (21). If a joint tenant in fee makes a lease for life of his share, this defeats the jointure (22). Whenever the jointure is severed, the *jus accrescendi*, or survivorship, ceases with it (23). If one of three joint tenants alienes his share to one of his companions, the two remaining parts

(18) Co. Litt. 188, 193. ^b 33 H. VIII. sess. 1.
c. 18. sect. 1, 3. (19) Litt. sect. 292. (20) Cro.
Eliz. 470. (21) 2 Rep. 60. Co. Litt. 182.
(22) Litt. sect 302, 303. (23) Co. Litt. 188.

are still held in jointure (24). Whenever the tenants have not the four indispensable properties of a sameness of interest, an undivided possession, a title vested at one and the same time, and by one and the same act, the jointure is dissolved. If there be joint tenants who make a partition, on the death of either, the reversioner shall enter on his moiety (25). If there be two joint tenants for life, and one grants away his part for the life of his companion, it is a forfeiture (26).

AN estate held in *co-parcenary*, is where lands descend from the ancestor to two or more persons. It arises either by common law, or by particular custom. By the former; as where a person, seized in fee simple, or fee tail, dies, and his next heirs are two or more females; in this case, they shall all inherit (27); as is fully shewn in ch. 14. of this book. By the latter, where land descend to all alike, as in gavel kind (28). They have the same unities of interest, title, and possession, as joint tenants.—They may sue, and be sued, for matters relating to their own lands (29). The entry of one

(24) Litt. sect. 294.

(26) 4 Leon. 237.

(28) Ibid. 265.

(25) 1 Jones 55.

(27) Litt. sect. 241, 242.

(29) Co. Litt. 164.

shall

shall in some cases enure, as of them all (30). They cannot have an action of trespass against each other. They are also excluded from an action of waste (31). They always claim by descent. Joint tenants always by purchase. If two sisters purchase lands, to hold to them and their heirs, they are joint tenants (32). There is no unity of time necessary to an estate in co-parcenary (33).

Parceners, although they have an unity, have not an entirety of interest. They are intitled to the whole of a distinct moiety. There cannot be any *jus accrescendi* (34); and each part descends to their respective heirs, though the unity of possession continues.—As long as the lands continue by descent, and united in possession, so long the tenants are parceners, whether males or females. If the possession be once severed by partition, they are tenants in severalty. If one parcener alienes her share, though no partition be made, then the lands are held in common (35).

Parceners may make *partition* by consent, in four ways, and in one by compulsion (36).

(30) Co. Litt. 188, 243.

(31) 2 Inst. 403.

(32) Litt. sect. 254.

(33) Co. Litt. 164, 174.

(34) Ibid. 163, 164.

(35) Litt. sect. 309.

(36) Ibid. 243,—264.

1. Where they agree to divide the lands in severalty. 2. When they agree to chuse some friend to make partition, and then the sisters shall chuse their part, according to seniority, or otherwise, if agreed. This privilege is personal, so if the eldest sister is dead, the second shall chuse, and not the representative of the eldest. If an advowson descend in parcenary, and the sisters cannot agree in the presentation, the eldest and her issue, or the husband, or her assigns, shall present alone, before the younger (37). 3. Where the eldest divides, she shall then chuse last, *cujus est divisio, alterius est electio*. 4. Where they all agree to cast lots for their shares. 5. Where one or more sue a writ of partition, under the direction of 8 and 9 W. III. c. 3^e. whereon the sheriff shall go to the lands, and make partition by verdict of a jury there empannelled, and assign to each her part in severalty.

SOME things are impartible.—The mansion-house, common of estovers, common of piscary uncertain, &c. shall not be divided; but the eldest sister, if she pleases, may

(37) Co. Litt. 166. 3 Rep. 2.

* They are not entitled to a writ of partition by stat. but at common law they have a writ *de partitione facienda*. Co. Litt. 164.

have

have them, and make a reasonable satisfaction in other parts. If that cannot be, they shall have the profits by turns, in the same manner as they take the advowson (38).

If one of the daughters has had an estate in *frank-marriage*, by her ancestor; in this case, if lands descend from the *same* ancestor to her and her sisters in fee simple, she or her heirs shall have no share of them, unless they divide the lands so given in frank-marriage in equal proportion with the lands descending (39); which is denominated bringing into *hotch-pot* (40). No lands but such as are given in frank marriage, shall be brought into hotch-pot (41). This estate may be dissolved by partition, which disunites the possession; by alienation of one parcener, which disunites the title; or by the whole descending to one single person.

TENANTS *in common*, are such as hold by several and distinct titles, but by unity of possession (42).—This tenancy happens where there is a unity of possession merely,

(38) Co Litt. 164, 165. (39) Brañon, l. 2. c. 34.
Litt. sect. 260, 273. (40) Litt. sect. 267.

(41) Ibid. 275.

(42) Ibid. 292.

and perhaps a disunion of interest, title, and time. If there be two tenants in common, one may hold his part in fee simple; the other in fee tail or for life. One may hold by descent; the other by purchase. One by purchase from A.; the other by purchase from B. One's estate may have vested fifty years; the other's but yesterday. It may be created by the destruction of the two other estates, or by special limitation in a deed. But such destruction must not be of the unity of possession. If one of two joint tenants in fee alienes for the life of the alienee, the alienee and the other joint tenant are tenants in common (43). If one joint tenant gives his part to A. in tail, and the other gives his to B. in tail, the donees are tenants in common (44). If one of two parceners aliene, the alienee and the remaining parcener are tenants in common (45). So if there be a grant to two men, or two women, and the heirs of their bodies, the grantees shall be joint tenants of the life estate, but shall have several inheritances (46). In this and the like cases, their issues shall be tenants in common. Whenever an estate in joint tenancy or coparcenary is dissolved, so that no partition

(43) Litt. sect. 293.

(44) Ibid. 295.

(45) Ibid. 309.

(46) Ibid. 283.

be made, but unity of possession continues, it is turned into tenancy in common.

THIS estate may be also created by express limitation in a deed, and then if lands be not given in joint-tenancy, it must be in common. In constructions, the law is apt to favour joint-tenancy (47), because the devisable services issuing from land, as rent, &c. are not divided, nor the entire services (as fealty) multiplied by joint-tenancy, as they must be in common-tenancy. Land given to two to be holden, the one moiety to one, and the other moiety to the other, is an estate in common (48). If one grants to another half his land, they are tenants in common (49). A devise to two persons, to hold jointly and severally, is a joint-tenancy (50). And an estate given to A. and B. equally to be divided between them, though in *deeds*, it has been held to be a joint-tenancy (51), yet, in *wills*, it is a tenancy in common (52). It is the safest way, when an estate in common is meant to be created, to add express words of exclusion, as well as description, and limit the estate to A. and B. to hold as tenants in common, and not as joint-tenants.

(47) Salk. 392.

(48) Litt. sect. 298.

(49) Ibid. 299.

(50) Poph. 52.

(51) 1 Eq. cases abr. 291. (52) 3 Rep. 39. 1 Ventr. 32.

TENANTS in common are compellable by 31 H. VIII. c. 1. and 32 H. VIII. c. 32. and 8 and 9 W. III. c. 3^d. to make partition of their lands. There is no *jus accrescendi* between tenants in common. By stat. West. 2. c. 22. and 4 An. c. 16^o. they are liable to actions of waste and account. If one actually turns the other out of possession, an action of ejectment will lie against him (53). These estates are dissolved, 1. By uniting all the titles and interests in one person, by purchase, or otherwise. 2. By making partition between the several tenants in common.

* 33 H. VIII. sess. 1. c. 10. sect. 1, 3. and 9 W. III. c. 37. sect. 1. directs the mode of effecting a partition.

* 6 Ann. c. 10. sect. 28. (53) Co. Litt. 200.

C H A P. XIII.

Of Title to Things Real in General.

THERE are several degrees requisite to form a complete title to lands and tenements.

1st. **T**HE lowest and most imperfect degree of title to lands, is the mere *naked possession*, or actual occupation, of the estate, without any shadow of right.—This happens when one invades the possession of another, and turns him out; which is termed a *disseisin*. It may happen after the death of the ancestor, and before the entry of the heir; or after the death of a particular tenant, and before entry of him, in remainder or reversion; in which, and many more instances, the wrong-doer has but the mere naked possession; but until some act be done by the right owner, to assert his title, such possession is *prima facie*, evidence of a legal title, and may, by time and negligence, ripen into a perfect title.

2nd. **T**HE next step to a good title is, the right of possession which may reside in
one

one man, while the actual possession is in another. This *right of possession* is of two sorts. *Apparent*, which may be defeated by proving a better; and *actual*, which will stand the test against all opponents. Thus if the wrong-doer dies possessed of the land of which he became seized by his unlawful act, and it descends to his *heir*, he hath an apparent right, and it shall not be lawful for the disseisee to divest this apparent right, but by an action at law (1).

IF the disseisee omits to bring his possessory action within a competent time, his adversary may gain an *actual right of possession*; and thus, and by certain other means, he may have nothing left in him, but,

3d. THE *mere right* of property, without possession, or the right of possession.—As if a person disseised neglects to pursue his remedy within the time limited by law, the disseisor or his heirs gain the actual right of possession; yet if the disseisee, or his heir hath the right of property remaining, his estate is said to be turned into a *mere right*, and by proving his better right may recover his land. If a tenant in tail discontinues his estate tail by alienation in

(1) Litt. sect. 385.

fee, and dies, here the issue hath no right of possession, independent of the right of property. If, by accident, or otherwise, judgment is given to either party in a possessory action (wherein the right of possession, not of property, is contested) and the other party hath indeed the right of property; this is now turned to a *mere right*; and on proof thereof, in a subsequent action, called a *writ of right*, he shall recover seisin.

AN action brought against the heir of the disseisor must be within thirty years. To recover the mere right of property, the action must be within sixty years. A complete title consists in the right of possession, the right of property, and actual possession (2).

(2) Mirr. l. 2. c. 27.

CHAP.

C H A P. XIV.

Of Title by *Descent*.

DESCEND is the title by which a man, on the death of his ancestor, acquires his estate by representation, or as heir at law.

As this depends (in order to declare who shall be such representative, or heir) on the *degrees of consanguinity*, it is therefore necessary to state the true notion of this kindred in blood. It is "*vinculum personarum ab eodem stipite descendendum*." It is either lineal, or collateral.

Lineal consanguinity subsists between two persons, of whom one is descended in a direct line from the other.—As between a man and his father, grand-father, and so upwards, in the direct ascending line; or, his son, grandson, and so downwards, in the direct descending line. Every generation in this lineal direct consanguinity constitutes a different degree, reckoning either upwards or downwards. The father of A. is related to him in the first degree; so is his son; and so on. So many different bloods has a man
in

in his veins, as he has lineal ancestors (1); which amount in a few degrees to a great number. He hath two in the first ascending degree, his parents; four in the second, the parents of his father and mother; one hundred and twenty-eight in the seventh^a.

Collateral

(1) Co. Litt. 23.

^a We have each two ancestors in the first degree; the number of whom is doubled at every remove; for each of our ancestors has also two immediate ancestors of his own.

Deg.	Ancest.	Deg.	Ancest.
1	2	7	128
2	4	8	256
3	8	9	512
4	16	10	1024
5	32	11	2048
6	64	12	4096

You will find the number of ancestors at any even degree, by squaring the number of ancestors at half that number of degrees: thus,

$$\begin{array}{rcl}
 4 \text{ the number at 2 degrees} & 16 \text{---} 4 & \\
 4 \text{ ---} & 16 & \\
 \hline
 16 \text{---} 4 & \hline
 & 96 & \\
 & 16 & \\
 & \hline
 & 256 \text{---} 8 &
 \end{array}$$

To find the number of ancestors, at any uneven degree, you must find out the number in the next preceding even degree, according to the foregoing rule, and then add the same number: thus,

$$\begin{array}{rcl}
 16 \text{ the number at 4 degrees} & 64 \text{---} 6 & \\
 16 & 64 & \\
 \hline
 32 \text{---} 5 & \hline
 & 128 \text{---} 7 & \\
 & \text{A FURTHER} &
 \end{array}$$

or ancestor; but differing in that they do not descend from each other. They are such as spring from the same ancestor, who is the *stirps* or root, from whence they are branched out.—As if A. hath two sons, who have each a numerous issue; both these issues are lineally descended from A. and they are collateral kinsmen to each other. As many ancestors as a man has, so many common stocks he has from which collateral kinsmen may be derived. The very being of collateral consanguinity consists in this descent from the same common ancestor.

THE method of computing these degrees in the canon law; which our law has adopted, is by beginning at the common ancestor and reckoning downwards; and in whatever degree the two persons, or the most remote of them, is from the common ancestor, this is the degree in which they are related to each other.—Thus *Titius* and his brother are related in the first degree; for from the father to each of them is only one. *Titius* and his nephew in the second; the nephew is two degrees from the common ancestor; namely, the grandfather and the father of *Titius*. Though, according to the computation of the Civilians (who count a
degree

degree for each person, both ascending and descending) ^b, *Titius* and his nephew are related in the third degree; from the nephew to the father, one; to the grandfather (who is the common ancestor) is two; and to *Titius*, is three degrees.

THERE are *rules* by which inheritances are transferred from the ancestor to the heir; of which the *first* is, that the inheritance shall *lineally descend* to the issue of the person last actually seized, but shall never lineally ascend. No estate of inheritance can vest until the ancestor is dead, *nemo est hæres viventis*. Until then, he who is next in the line of succession, is called heir *apparent*, or heir *presumptive*. *Heirs apparent* are those whose right of inheritance is indefeasible if they outlive the ancestor.—*Heirs presumptive* are such, as if the ancestor died immediately would be his heirs, but whose right may be defeated by some nearer heir being born. If an estate hath descended to such presumptive heir, as to a brother, nephew, or daughter; in the former cases, it shall be taken away by the birth of a posthumous child; and in the latter, by the birth of a posthumous son (2). No per-

^b The rule of reckoning among the Civilians is “quot personæ tot gradus abjeeta communi stipite.”

(2) Bro. tit. descent. 58.

son can be properly such an *ancestor*, as that an inheritance in lands and tenements can be derived from him, unless he hath had actual *seisin*, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold (3); or unless he hath equivalent to corporal *seisin* in incorporeal hereditaments; as receipt of rent, presentation to a church, or the like (4). This *seisin* makes the root or stock, from whence all future inheritance by right of blood must be derived, "*seisina facit stipitem* (5)." When a man dies, so seized, the inheritance first goes to his issue; as if there be A, B, C, grandfather, father, and son; and B. purchases lands, and dies; his son C. shall succeed him as heir, and not the grandfather, A. to whom the land shall never *ascend*, but shall rather escheat to the lord (6.)

2nd. A SECOND rule is, that the *male issue* shall be *admitted before the female*. As if A. hath two sons, B. and C.; and two daughters, D. and E.; and dies; first B. (and in case of his death without issue) C. shall be admitted to the succession, in preference to both the daughters.

(3) Co. Litt. 15.

(4) Ibid. 11.

(5) Flet. l. 6. c. 2. sect. 2.

(6) Litt. sect. 3.

3d. A THIRD rule is, that where there are two or more males in equal degree, the eldest only shall inherit; but the females all together.—As if A. hath two sons, B. and C.; and two daughters, D. and E.; and dies; B. his eldest son, shall inherit alone the estate; but if both the sons die without issue, before the father, the daughters, D. and E. shall both inherit as co-parceners (7). But the succession of *primogeniture* takes place in the inheritance of the crown (8). And the right of sole succession, though not *primogeniture*, is established with respect to female dignities, and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters, the eldest shall not, of course, be countess, but the dignity is in suspense until the king shall declare his pleasure, and shall confer it on which he pleases (9).

4th. A FOURTH rule of descent is, that the lineal descendants *in infinitum* of any person deceased, shall represent their ancestor; that is, shall stand in the place that the person himself would have done, had he been living. Thus the child, grandchild, &c. (either male or female) of the eldest son,

(7) Litt. sect. 5. H. H. C. L. 238. (8) Co. Litt. 165.

(9) Ibid.

shall

shall succeed before the younger son *in infinitum* (10). And these *representatives* shall take just so much as their principals would have done.—As if there be two sisters, A. and B. and A. dies, leaving six daughters, and then the father of A. and B. dies without other issue; these six daughters shall take among them one-half of the lands of their grandfather in co-parcenary; and B. shall take the other moiety. This taking by representation, is called a succession *in stirpes*. If a man hath three daughters, A, B, C; and A. dies, leaving two sons; B. leaving two daughters; and C. leaving a daughter, and a son, who is younger than the sister;—when the grandfather dies, the eldest son of A. shall take one third; the two daughters of B. shall take another third in co-parcenary; and the son of C. shall take the remaining third, in exclusion of his elder sister.

5th. A FIFTH rule is, that in failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to the *blood of the first purchaser*, subject to the three preceding rules. Thus if A. purchase land, and it descends to B. his son, who dies without issue; whoever succeeds

(10) Hale, H. C. L. 236, 237.

must be of the blood of A. the first purchaser (11), who is he to whom it had been first transferred in any manner, except by descent. Every grant of land in fee simple is, with us, a *feudum novum*, to be held *ut antiquum* [that is, the law allows it to be supposed to have descended from some ancestor; and therefore admits any of the collateral kindred (who have the other necessary requisites to the inheritance) which we see could not have been otherwise the case] or any of the descendants from any of his lineal ancestors, by whom the lands might have been purchased. But in estates in fee tail, none but the lineal descendants of the first donee are admitted.—Yet when an estate hath really descended to the person last seized, none are admitted but the heirs of those, through whom the inheritance hath passed.—As if lands come to a man by descent from his mother, no relation of his father (as such) shall ever be his heir of these lands; and *vice versa*, if they descend from his father. And so if the estate descended from his father's father, the relations of his father's mother shall never be admitted. But when, through length of time, it cannot be traced any farther, as if it be not known whether his grandfather

inherited it from his father or his mother; or if it appears that his grandfather was the first grantee, the law admits the descendant of any ancestor of the grandfather, either paternal or maternal, to be in due order the heirs of the grandson; the law being, that he who would have been heir to the father, shall be heir to the son (12).

6th. A SIXTH rule is, that the *collateral* heir of the person last seized, must be his *next collateral* kinsman of the *whole blood*; that is, either personally, or *jure representationis*, which is to be reckoned according to the canonical *degrees of consanguinity*.—Therefore the brother and his issue being in the first degree, shall exclude the uncle and his issue, being the second. Thus if A. dies without issue, his estate shall descend to B. his brother, who is descended from the same father. On failure of brethren and sisters, and their issue, it shall descend to the uncle of A. the lineal descendant of his grandfather, and so on *in infinitum*.

IN order to ascertain the collateral heir of A. it is necessary to recur to his ances-

(12) Year book, Mich. 12 Ed. IV. 14. Fitzh. abrid. tit. discent 2. Bro. abr. tit. discent 38. Hal. H. C. L. 243.

tors in the first degree, and if they have left any issue besides A. they shall be his heir. On default of such, we must ascend one step higher to the ancestors of the second degree; and then to those of the third, and so on *in infinitum*. In such derivation, the same rules of sex, *primogeniture* and representation as have been before laid down in lineal descents, must be observed.

THIS nearest kinsman must be of the *whole blood*; that is, descended from the same couple of ancestors. Thus, the blood of A. being composed of those of B. and C, his father and mother, therefore his brother D. being descended from the same couple of ancestors, hath the entire *same blood* as A. But if after the death of B, the father; C, the mother, marries a second husband, E, and hath issue by him; such issue is only the *half-blood*, and thence but half-brother to A.; and shall therefore never inherit to each other. So if the father hath two sons by different venters, they are only brothers of the half blood, and shall never inherit to each other.—But the estate shall rather escheat to the lord. If the father dies, and his lands descend to his eldest son A. who dies seized without issue, still B. shall not be heir to this estate, because he is only of
the

the half blood to A. the person last seized ; but, had A. died without entry, then B. might have inherited, as heir of the father, who would have been the person last seized (13). Thus, let there be A. and B, brothers, by the same father and mother, and another son of the same mother, by a second husband : if A. dies, seized of lands, and it is uncertain whether they descended from his father or mother, yet his brother B, is qualified to be his heir.—But if B. should die before A, without issue, the mother's son, by the second husband, is utterly incapable of being heir ; for he cannot prove his descent from the first purchaser who is unknown ; nor has he the fair probability which the law permits as presumptive evidence, since he is as likely, to the full, not to be descended from the line of the purchaser, as to be descended : it shall go therefore to the next relation possessed of this presumptive proof, the *whole blood*.—Yet the crown may descend to the *half blood* of the preceding sovereign (14), so as it be the blood of the first monarch purchaser of the reigning family. Thus it descended from Edward VI. to Mary, and then to Elizabeth, who were of the half blood to each

(13) Hal. H. C. L. 238.
Litt. 15.

(14) Plowd. 245. Co.

other. Also in estates tail, where the pedigree, from the first donee, must be strictly proved, half blood is no impediment to the descent (15).

As every man hath many couples of ancestors, increasing upwards in geometrical progression, the descendants of all which respective couples are (representatively) related in the same degree, a great difficulty arises, to which of these ancestors we must resort to find out descendants to be preferably called to the inheritance. In the second degree, the issue of the two grandfathers and grandmothers of A. are in the same degree of propinquity. In the third degree, the respective issues of the great-grandfathers, and great-grandmothers, and so on.

To regulate this embarrassment, the *seventh* and *last* rule is, that in *collateral inheritances*, the *male* stocks shall be preferred to the *female*, (that is, the kindred derived from the blood of the male ancestors shall be admitted before those from the blood of the female) unless where the lands have descended from a female.—Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side (16); and

(15) Litt. sect. 14, 15.

(16) Ibid. sect. 4.

the relation of the father's father, before those of the father's mother, and so on.—The father's line is to be searched back *in infinitum*, before any issue on the mother's side can inherit. When land descends from the mother's side, no relation by the father's side can be (as such) admitted. So if they descend from a man's father's mother;—here not only the blood of his mother, but also of his father's father, is excluded, and so on.

If it is unknown from which side they descend; the law supposes them to descend from the male line; therefore the inheritance follows the foregoing rules:—Thus B, the eldest son of A, succeeds, or his issue; if his line be extinct, then C, the second son, and the other sons successively, and their issue.—In default of these, D. and E, the daughters together, or their issue.—On failure of the descendants of A, the issue of F. and G, his parents, are called in, *viz.* H. the elder brother of the whole blood, and his issue; then the other whole brothers successively, and their issue; then I. and K, the sisters of the whole blood together, or their issue.—In default of these, then the issue of L. and M, his father's parents; respect being had to their age and sex; then the issue of N. and O, the pa-
rents

rents of his paternal grandfather; then the issue of P. and Q. the parents of his paternal grandfather's father; and so on, in the paternal grandfather's paternal line or blood of N. *in infinitum*.—In defect of these, the issue of R. and S. the parents of his paternal grandfather's mother, or blood of O.; and so on, in the paternal grandfather's maternal line *in infinitum*, until both the immediate bloods of L. the paternal grandfather are spent.—Then to the issue of T. and U. the parents of A's paternal grandmother.—Then to the issue of W. and X. the parents of his paternal grandmother's father; and so on, in the paternal grandmother's paternal line, or blood of T. *in infinitum*.—In default of these, we must call in the issue of Y. and Z. the parents of his paternal grandmother's mother; and so on, in the paternal grandmother's maternal line, or blood of U. *in infinitum*, till both the immediate bloods of M. the paternal grandmother, are spent; whereby the paternal blood of A. entirely failing, recourse must then be had to the blood of his maternal relations, or blood of G. in the same successive order as in the paternal line.

C H A P. XV.

Title by *Purchase*,—and First, by *Escheat*.

PURCHASE is the possession of lands by any other means but descent (1). For if I give land freely to another, he is in the eye of the law a purchaser (2). One who has his father's estate settled on him before he is born, is a purchaser. If an ancestor devise his estate to his heir at law, with other limitations, or in any other shape than the course of descent would direct, he shall take by purchase (3). But if a man devises his estate to his heir at law, so that he takes neither a greater or less estate by the devise, than he would without it, he shall be adjudged to take by descent (4), even though it be charged with incumbrances (5). If an estate be limited to the heirs of A, here A. takes nothing; but if he dies during the particular estate, his heirs shall take by purchase (6). If an estate be made to A. for life, remainder to

(1) Litt. sect. 12.

(2) Co. Litt. 18.

(3) Lord Raym. 728.

(4) 1 Rol. abr. 625.

(5) Salk. 241. L. Ray. 728. (6) 1 Rol. abr. 627.

his

his right heirs in fee, his heirs shall take by descent. It is a rule in law, that wherever the ancestor takes an estate for life, the heirs, by the same conveyance, cannot take an estate in fee, but by descent (7).— If A. dies before entry, still his heir shall take by descent, not purchase (8).

THE difference between the acquisition of an estate by descent, and by purchase, consists chiefly in two points. 1. By purchase, the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent.

AN estate by purchase may be acquired, 1st. By *escheat*. 2nd. By *occupancy*. 3d. By *prescription*. 4th. By *forfeiture*. 5th. By *alienation*.

ESCHEAT is founded on a principle that the blood of the person last seized in fee simple is, by some means, utterly extinct; and therefore the land must revert to the

(7) 1 Rep. 104. 2 Lev. 60. Raym. 334.

(8) 1 Rep. 98.

lord by whom, or by those whose estate he hath, it was given.

THE means whereby the *inheritable blood* may be extinct are,

1st. WHEN the tenant dies without any relations on the part of those ancestors from whom the estate descended.

2nd. WHEN he dies without any relations on the part of any of his ancestors.

3d. WHEN he dies without any relations of the whole blood.

4th. A *monster*, which hath not the shape of mankind, but in any part bears resemblance of the brute creation, hath no *inheritable blood*, although brought forth in marriage; yet though it hath deformity in any part of its body, if it hath human shape, it may be heir (9); therefore such a birth will not entitle a man to be tenant by the curtesy (10).

5th. *Bastards* are *incapable to be heirs*, being the sons of nobody. In one instance, the law is more favourable which is usually termed the case of *bastard eigne*, and *mu-*

(9) Co. Litt. 7, 8.

(10) Ibid. 29.

lier puisné; which happens, when a man hath a bastard son, and afterwards marries the mother, and by her has a legitimate son, who is called a *mulier*. Here the elder son is *bastard eigné*; the younger, *mulier puisné*. If the father dies, and the *bastard eigné* enters on the land, and dies seized of it, whereby the inheritance descends to his issue; in this case, the *mulier puisné*, and all other heirs (though under any incapacity whatever) are totally barred of their right (11). As bastards cannot be heirs, so they can have no heirs, but of their own bodies. Therefore if a bastard purchases land, and dies seized, without issue and *intestate*, the land shall escheat to the lord of the fee (12).

6th. *Aliens* are incapable of taking by descent, or inheriting (13); wherefore if a man leaves no other relations but aliens, the land shall escheat. They are also disabled to hold by purchase (14); so they can (or need) not have heirs (15). If an alien be made a *denizen*, by the king's letters patent, and then purchases land, (which the law allows) his son born before deniza-

(11) Co. Litt. 244. Litt. sect. 399. (12) Co. Litt. 244. Bract. l. 2. c. 7. (13) Co. Litt. 8. (14) Ibid. 2. (15) Ibid. 1 Lev. 59.

tion, shall not (by common law) inherit those lands ; but a son born after, may, even though his elder brother be living.—Yet if he had been *naturalized* by act of parliament, such eldest son might then have inherited.—This having a retrospect, which simple denization has not (16). The sons of an alien, born here, may inherit to each other (17). By 11 and 12 W. III. c. 6^a. all persons, being natural born subjects of the king, may inherit and make their titles by descent from any of their ancestors, lineal or collateral, although their father, or mother, or other ancestor, by, from, through, or under whom, they may derive their pedigree, were born out of the king's allegiance.—From whence inconveniences were apprehended, that persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seized.—As if A, the elder brother of B, be an alien, and C, the younger brother, be a natural born subject, upon B's death, without issue, his lands will descend to C, the younger brother :—now, if afterwards A. hath a child, it was feared that, by this statute, this new-born child might defeat the estate of his uncle. Wherefore, by 25 G. II.

(16) Co. Litt. 129. (17) 1 Vent. 473. 1 Lev. 59.
1 S.d. 193. 2 Eng. stat.

c. 39^b. no inheritance shall accrue, in virtue of the former statute, to any persons, unless they are in being, and capable to take as heir, at the death of the person last seized, excepting the case where the lands shall descend to the daughter of an alien, who shall resign her inheritance to her after-born brother; or divide it with her after-born sisters, according to the rule of descent.

7th. By *attainder* also for treason or other felony, the *blood is so corrupted*, as to be rendered no longer inheritable. Great care must be taken to distinguish between forfeiture to the king, and escheat to the lord. The latter acts in subordination to the former. Escheat on attainder, is, that the blood of the tenant, by commission of any felony, is corrupted and stained (18); and the original donation of it, thereby determined. In consequence of which, the lands of all felons would revert in the lord, but the law of forfeiture intervenes, in case of treason, for ever, in case of other felony for *a year and a day*; after which, it regularly goes to the lord as an escheat (19). By 1 Ed. VI. c. 12^c, although a person be

^b Eng. stat. (18) 3 Inst. 15. 25 Ed. III. c. 2. sect. 12.
 (19) 2 Inst. 36. ^c Eng. stat. 17 Ed. II. c. 16. if
 attainted of felony.

attainted

attainted of misprision of treason, murder, or felony; yet his wife shall enjoy her dower. By 5 and 6 Edw. VI. c. 11^d. the wife of one attainted of high treason shall not be endowed at all. These doctrines only relate to estates vested in the offender at the time of his offence, or attainder.—Here the law of forfeiture stops.—But escheat goes farther; for the blood of the tenant being utterly corrupted, it follows, that not only all he has, should escheat from him, but that he shall be incapable to inherit any thing in future. If therefore a father be seized in fee, and the son commits treason, and is attainted, and then the father dies, the land shall escheat, for the son is incapable to be heir, and there can be no other during his life: but nothing shall be forfeited to the king (20). Where a new felony is created by act of parliament, and it is provided, that it shall not extend to corruption of blood, the land shall not escheat, but the profits shall be forfeited to the king, so long as the offender lives (21). The person attainted shall not only be incapable himself of inheriting or transmitting by heirship, but he shall obstruct the descent of lands to his posterity, in all case,

* 33 H. VIII. sess. 1. c. 1. sect. 2. 27 Eliz. c. 1. sect. 8.
(20) Co. Litt. 13. (21) 3 Inst. 47.

where

where they are obliged to derive their title through him. This corruption of blood cannot be removed, but by authority of parliament. If a man hath a son, and is attainted, and afterwards pardoned by the king, this son can never inherit to his father, or his father's ancestors.—But if the son be born after the pardon, he may inherit (22). If a man hath issue, a son, and is attainted, and pardoned, and then hath issue, a second son, and dies; here the corruption is not removed from the elder, therefore he cannot be heir; nor can the younger be heir, for he hath an elder brother living; but the land shall escheat; though, if the elder had died without issue in the life of the father, then the younger son might have inherited (23). So if a man hath two sons, and the elder, in the life time of the father, hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son, and the land shall escheat (24).—Though, if the ancestor be attainted, his sons, born before the attainder, may be heirs to each other (25). So sons, born after attainder, can inherit to each other (26).

(22) Co. Litt. 392.

(23) Ibid. 8.

(24) Dyer 48.

(25) Co. Litt. 8.

(26) 1 H. P. C. 357.

By 7 An. c. 21. the operation of which is postponed, by 17 G. II. c. 39. is enacted, that after the death of the late Pretender and his sons, no attainder for treason shall extend to disinherit any heir, nor to the prejudice of any person, but the offender himself.

IN case of a *corporation*, land shall not escheat, but if it be dissolved, the land shall revert to the donor (27), which is the only instance where a reversion can be expected on a fee simple.

By 11 and 12 W. III. c. 4°. every *papist* who shall not abjure the errors of his religion,

(27) Co. Litt. 13.

* Eng. stat. 1. Ann. sess. 1. c. 32. sect. 1. Such non-conforming papist shall be incapable to take by descent, devise, or limitation, any of the forfeited estates purchased in Ireland. Irish stat. 2 Ann. c. 6. sect. 8, 9. made perpetual by 8 Ann. c. 3. Papists are disabled to purchase or take lands, &c. or the profits arising thereout, for more than thirty-one years, and whereon a rent of, at least, two-thirds of the value must be reserved; and they are debarred from taking the profits of lands, &c. by descent, &c. whereof a protestant is seized; the freehold of which is to come to the son of such papist. 8 Ann. c. 3. sect. 1. They are disabled to take annuities for life or years, determinable on a life or lives.—However, 17 and 18 G. III. c. 49. sect. 1. gives a power to take leases for nine hundred and ninety-nine years, or for any term of years determinable

gion, by taking the oaths, and making the declaration against transubstantiation, within six months after he has attained eighteen years, shall be incapable of inheriting, or taking by descent, as well as by purchase, any real estate whatever: and his next of kin (being a protestant) shall hold them, till he complies with the terms of the act. The incapacity is personal, and does not destroy the inheritable quality of his blood, so as to impede the descent of others of his kindred.

minable upon any number of lives, not exceeding five, upon the conditions therein mentioned.—And by sect. 8. no suits shall be commenced against such persons, being in possession of lands, but that they shall quietly enjoy the same. By this act the general spark of toleration is illumined; and perhaps the wisdom of the legislature may, with unceasing ardour, fan the generous flame, until, by kindling an undistinguishing fire, the whole code of penal laws shall be consumed.

C H A P. XVI.

Of Title by *Occupancy*.

OCCUPANCY is the taking possession of things that belong to nobody. By 29 C. II. c. 3^a. where there is no *special occupant* in whom the estate may vest, the tenant *pur auter vie* (for this was the only instance at the common law in which real property could want an owner) may devise it by will; or it shall go to the executors, and be assets for payment of debts. By 14 G. II. c. 20^b. it shall vest not only in the executors, but in case the tenant dies *intestate*, in the administrators, and go in the course of distribution like a chattel interest. Thus the title by common occupancy is totally extinct.

TITLE of special occupancy, by the heir at law, still continues; such heir being held

^a 7 W. III. c. 12. sect. 12.; or if it comes to the heir by special occupancy, it shall be chargeable as assets in his hands.

^b By the last mentioned statute.

to succeed to the ancestor's estate, not by descent, but by occupancy, specially marked out by the original grant. A grant of rents, or other incorporeal hereditaments, is by the death of the grantee *pur auter vie*, determined (1).

WHERE lands are newly created by the rising of an *island* in a river; or by the *alluvion* or *dereliction* of the sea, the law assigns then an owner. If it arises in the middle of the river, it belongs in common to those who have lands on each side. If nearer one side than the other, then to him who is the proprietor of the nearest shore (2). However if a new island arises in the sea, it belongs to the king (3).

As to the lands gained from the sea by *alluvion*, so as to make *terra firma* (or by *dereliction*); if this gain by little and little, it shall go to the owner of the land adjoining (4), *de minimis non curat lex*.—But if it be sudden and considerable, it belongs to the king (5). So if a river, running between two lordships, by degrees gain on the one, and leaves the other dry, the owner

(1) Vaugh. 201.

(2) Braët. l. 2. c. 2.

(3) Ibid. Callis of sewers 12.

(4) 2 Rol. abr. 170.

Dyer 326.

(5) Callis, 24, 28.

who thus loses his ground has no remedy. But if the course be changed by a sudden and violent flood, and thereby a man loses his ground, he shall have what the river has left in any other place (6).

(6) Callis, 28.

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CHAP.

C H A P. XVII.

Of Title by *Prescription*.

THIS is when a man can shew no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it. The distinction between *prescription* and *custom* is, that the latter is a local usage, and not annexed to any person: as a custom in the manor of Dale, that the lands shall descend to the youngest son. The former is a personal usage (1).—As if tenant in fee of the manor of Dale, alledges that he and his ancestors, or all those whose estate he hath in said manor, have used, time out of mind, to have common in such a close.

ALL prescriptions, must be either in a man and his ancestors, or in a man, and those whose estate he hath (2); which last is called prescribing in a *que estate*. By 32 H. VIII. c. 2^a. no person shall make prescription by the seisin of his ancestor or pre-

(1) Co. Litt. 113.

(2) 4 Rep. 32.

^a 10 C. I. sess. 2. c. 6. sect. 1.

decessor,

deceffor, unlefs fuch feifin hath been within fixty years next before fuch prefcription made. Nothing but incorporeal hereditaments can be prefcribed for, as a right of way, &c (3). A prefcription muft be always laid in him that is tenant in fee. Tenant for life, &c. cannot prefcribe by reafon of the imbecility of his eftate (4). Such muft prefcribe under cover of tenant in fee, and plead that he demifed the faid manor with the appurtenances to him. A prefcription cannot be for a thing that cannot be raifed by grant (5). That which is to arife by matter of record cannot be prefcribed for; as for inftance, royal franchifes of deodand, and the like. But the franchifes of treafure-trove, and fuch like, may be prefcribed for, as they arife from private contingencies, and not by record (6). If a man prefcribes in a *que eftate*, nothing is claimable thereby, but fuch things as are incident, appendant, or appurtenant to land.—But if he prefcribes in himfelf and anceftors, it may be for any thing that lies in grant, as well appurtenant as in grofs (7). Thus a man may prefcribe by *que eftate*, for the advowfon of Dale, being *appendant* to the manor; otherwife,

(3) Dr. and St. dial. 1. c. 8. Finch. 132.

(4) 4 Rep. 31, 32.

(5) 1 Ventr. 387.

(6) Co. Litt. 114.

(7) Litt. feft. 183. Finch.

l. 104.

if it be a distinct inheritance.—So he may prescribe in a *que estate* for a common *appendant* to a manor; but if he would prescribe for a common *in gross*, it must be in himself and ancestors. If a man prescribes for a right of way in him, and his ancestors, it will descend only to the blood of that line of ancestors; but if he prescribes in a *que estate*, it will follow the nature of the estate in which the prescription is laid, and be inheritable in the same manner.

C H A P. XVIII.

Of Title by *Forfeiture*.

LANDS, tenements, and hereditaments, may be forfeited, 1. By crimes and misdemeanors. 2. By alienation contrary to law. 3. By *lapse*. 4. By *simony*. 5. By non-performance of conditions. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

1st. By *crimes* and *forfeitures*; the degrees of which, and their proportion to the several offences, have been treated of in ch. 8. book 1.; and will be treated of in ch. 29. book 4.

OFFENCES which induce a forfeiture to the crown, of lands and tenements, are six; treason,—felony,—misprision of treason,—*præmunire*,—drawing a weapon on a judge, or striking in presence of the king's principal courts of justice,—popish recusancy.

2nd. By *alienation* in *mort-main*, to an *alien*, or by *particular tenants*.

ALIENATION

ALIENATION in *mort-main* is, of lands, &c. to any corporation, sole or aggregate, ecclesiastical or temporal. It is necessary for a corporation, in order to take such lands, to have a *license* from the crown (1), or else they become forfeited, by 27 Ed. I. stat. 2. and 7 and 8 W. III. c. 37.—But by 17 C. II. c. 3^a. appropriators may annex the *great tithes* to the vicarages; and all benefices under one hundred pounds per ann. may be augmented by the purchase of lands without licence in either case.—And by 2 and 3 Ann. c. 11. the same provision is extended in favour of the governors of Queen Anne's bounty.—Also by 9 G. II. c. 36. no lands, or tenements, or money to be laid out thereon, shall be given for, or charged with, any *charitable use* whatsoever, unless by deed indented, executed in presence of two witnesses, twelve months before the death of the donor, and inrolled in chancery within six months after its execution (except stocks in the public funds, which may be transferred within six months previous to the donor's death); and unless such gift be made to take effect immedi-

(1) F. N. B. 121.

^a 10 and 11 C. I. c. 2, sect. 1. appropriators may convey all, or any part of glebes, tithes, or other rights whatsoever, heretofore ecclesiastical.

ately,

ately, and be without power of revocation, and that all other gifts shall be void.

THE two *universities*, and their colleges, and the scholars on the foundations of the colleges of Eton, Westminster, and Winchester, are excepted out of this act,—with this proviso, that no college shall be at liberty to purchase more advowsons, than are equal in number to one moiety of the fellows or students on the respective foundations.

ALIENATION to an *alien*, is a forfeiture to the crown of the lands so aliened.

ALIENATION by *particular tenants* is, if a tenant for his own life alienes in fee, &c. it is a forfeiture to him in remainder or reversion (2). The same law holds with respect to tenants of chattel interests. But if a tenant in tail alienes in fee, it is no forfeiture to the remainder man, but a discontinuance of the estate tail, which the issue may afterwards avoid by law (3). So if a tenant neglects to render the due service, and on action brought, *disclaims* to hold of his lord; which disclaimer, in any court of record, is a forfeiture of the lands to the lord (4). So,

(2) Litt. sect. 415.

(3) Ibid. sect. 595, 596, 597.

(4) Finch, 270, 271.

if

if the tenant, in any court of record, claims any greater estate than was at first granted to him, or takes on him those rights that belong only to a superior tenant (5). If he affirms the reversion to be in a stranger, by attorning as his tenant, or such like (6); such amount to a forfeiture.

3d. *Lapse*, is a forfeiture whereby the right of presentation to a church accrues to the ordinary, on neglect of the patron, to present for six calendar months (7), (exclusive of the day of avoidance) (8).—And if the ordinary neglects to present for six months, then the right goes to the metropolitan; and if he neglects for six months, then to the king. But if, during any of those delays, (even though after the lapse of the patron) the patron presents before the ordinary, or metropolitan, his clerk shall be instituted (9). If the representation lapses to the king, the patron shall never recover his right, until the king has presented, for *nullum tempus occurrit regi* (10). Yet, if during the delay of the crown, the patron presents, and the clerk is instituted, the king may, by presenting another, turn out his clerk; but if he does

(5) Co. Litt. 252.

(6) Ibid. 253.

(7) 6 Rep. 62. Regist. 42.

(8) 2 Inst. 361.

(9) Ibid. 273.

(10) Dr. and St. dial. 2.

c. 36. Cro. Car. 355.

not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right (11). If the bishop be both patron and ordinary, he shall not have double time to collate (12). The bishop, or metropolitan, shall not have any power to present (as the patron hath) after their respective six months have elapsed (13).

IF a benefice becomes void by death or cession through plurality of livings, there the patron is bound to take notice of the vacancy. But in case of a vacancy by resignation, or canonical deprivation, or if a clerk be refused for insufficiency, here the patron must have notice, else there is no lapse (14). — Nor shall any lapse accrue thereby to the metropolitan, or to the king. If the bishop refuses or neglects to admit the patron's clerk, without good reason assigned, or notice given, he is a *disturber* in law, and shall not have any title to present by lapse (15). Also if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur until the question be decided (16).

(11) 7 Rep. 28. Cro. Eliz. 44. (12) Gibf. cod. 769.

(13) 2 Rol. abr. 368. (14) 4 Rep. 75. 2 Inst. 632.

(15) 2 Rol. abr. 369. (16) Co. Litt. 344.

4th. By *simony*, the right of presentation is forfeited, and vested, *pro hac vice*, in the crown. It is the corrupt presentation of any one to an ecclesiastical benefice, for money, gift, or reward^b. By 31 El. c. 6. if any person, for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice; such presentation shall be void, and the presentee rendered for ever incapable of enjoying that benefice, and the crown shall present that time. By 12 An. any person procuring for money or profit, in his own name, or in the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereon; the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown. On these statutes, these points are clearly determined, 1. To purchase a presentation, the living being vacant, is simony (17). 2. So, for a clerk to bargain for the next presentation, the incumbent being sick, and near to die; or to purchase either in his own name, or ano-

^b It is held at common law to be a great offence, Cro. Car. 353. and the penalty must be conformable thereto, as there is no statute law to define it.

(17) Cro. Eliz. 788. Moor 914.

ther's, the next presentation, and be thereon presented at any future time, is simony (18). 3. A father may purchase such a presentation, to provide for his son (19). 4. If a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation shall, for that turn, devolve to the crown; but the clerk does not incur any disability or forfeiture (20). 5. Bonds given to charitable uses on receiving a presentation, provided the patron, or his relations, are not benefited thereby (21), are not simoniacal (22). So bonds to resign, when the patron's son comes of age, are legal (23). 6. General bonds, to resign at the patron's request, are legal (24)*.

5th. BY *breach or non-performance of conditions* annexed to an estate, either expressed or implied (of which we treated in chap. 10. of this book).

6th. WASTE, is another species of forfeiture, and is either *voluntary or permissive*; the former is a crime of commission, as pul-

(18) Hob. 165. (19) Cro. Eliz. 686. Moor 916.

(20) 3 Inst. 154. Cro. Jac. 385. (21) Stra. 354.

(22) Noy 142. (23) Cro. Jac. 248, 274.

(24) Cro. Car. 180. Stra. 227.

* Bonds on a simoniacal contract are void at common law. Hob. 167. Cro. Car. 425. Carth. 252.

ling down a house; the latter is omission only, as by suffering it to fall for want of repair,—moving wainscots, or other things, fixed to the freehold of a house, is waste (25). If a house be destroyed by tempest, or the like, it is no waste. By 6 An. c. 31^d. no action will lie against a tenant, if the house be burnt by carelessness or negligence.—It may be committed in ponds, or the like, by reducing the number of fish, so as not to leave enough for the reversioner (26). To cut down *trees*, or to do any act whereby the timber may decay, is waste (27). But the tenant may cut underwood when he pleases (21), and may take sufficient estovers, &c. unless restrained by particular covenants (29). Converting land, as from meadow into pasture, &c. is waste (30). So to convert one kind of edifice into another (although for the better) is waste (31). To open the lands to search for mines, is waste (32); but if the pits were open, the tenant may continue digging (33). By statutes Marlbridge, 52 H. III. c. 23. and Gloucester, 6 Ed. I. c. 5. a writ of waste shall lie against

(25) 4 Rep. 64. ^d 2 G. I. c. 5. sect. 1. unless otherwise agreed to, by covenant.

(26) Co. Litt. 53.

(27) Ibid.

(28) 2 Rol. abr. 817.

(29) Co. Litt. 41.

(30) Hob. 296.

(31) 1 Lev. 309.

(32) 5 Rep. 12.

(33) Hob. 295.

all

all tenants by curtesy, dower, for life or years, unless their leases are made *without impeachment of waste*. By the last statute, it is enacted, that such tenants shall forfeit the place wherein the waste is committed, and treble damages, to him that hath the inheritance. If waste be done here and there, over a wood, it shall be all forfeited; or in several rooms of a house (34).—But if only done in one end of the wood (or perhaps in one room of a house) if it can be conveniently separated from the rest; that part is only the *locus vastatus*, and shall only be forfeited (35).

7th. THE *breach of copyhold customs*, is a forfeiture to the lord; as subtraction of suit and service (36),—disclaiming to hold of the lord, or swearing himself not his copyholder (37),—neglecting to be admitted tenant within a year and a day (38). But the forfeiture does not accrue till after the offences are presented by the homage, or jury of the lord's court (39).

8th. BANKRUPTCY works a forfeiture to the creditors of the effects of a bankrupt, who is one that secretes himself, or does

(34) Co. Litt. 54.

(35) 2 Inst. 304.

(36) 3 Leon. 108. Dyer 211. (37) Co. copyh. sect. 57.

(38) Plowd. 372.

(39) Co. copyh. sect. 58.

other

other certain acts, tending to defraud his creditors. The acts which make a bankrupt are considered in ch. 31. of this book. By 13 Eliz. c. 7^e. the commissioners of a bankrupt have full power to dispose of all his lands, &c. which he had in his own right when he became a bankrupt, or which shall come to him before his debts are agreed for, and all lands that were purchased by him jointly with his wife or children, for his own use, or by any person in trust for him. This extends to free and copyhold lands. And by 21 Jam. I. c. 19^e. the commissioners are impowered to dispose, by deed, of any lands of the bankrupt wherein he shall be seized in fee tail, in possession, remainder, or reversion, unless the remainder or reversion belongs to the crown, which shall be good against all persons that the bankrupt might have barred by common recovery, or other means. And that equities of redemption on mortgaged estates shall be at the disposal of the commissioners.— All fraudulent conveyances to defeat these statutes, are void*. But no purchaser *bona fide*, shall be affected, unless the commission be sued out within five years after the act of *bankruptcy* commenced.

* 11 and 12 G. III. c. 8. sect. 3. continued by 17 and 18 G. III. c. 48. sect. 6. † Ibid. sect. 3. ‡ Ibid. sect. 6.

C H A P. XIX.

Of Title by *Alienation*.

UNDER this head may be comprised any method whereby estates are voluntarily resigned by one, and accepted by another; whether by gift, marriage settlement, or otherwise.

ALL persons in possession, are *prima facie*, capable of conveying or purchasing, unless the law has laid them under some disabilities.— But if a man has only the *right of possession*, he cannot convey it to another (1). Remainders and reversions may be granted, if they are vested ones: but contingent remainders, and *mere possibilities*, though they may be released, or devised by will, or may pass to the heir or executor, yet cannot be assigned to a stranger, unless coupled with some present interest (2).

PERSONS *attainted of treason, felony, and præmunire*, are incapable of conveying from the time of the offence committed, provid-

(1) Co. Litt. 214. (2) Sheppard's touchstone, 238.
239, 322. 11 Mod. 152. 1 P. Wms. 574. Stra. 132.

ed attainder follows (3). But they may purchase for the benefit of the crown, or the lord of the fee; the lands so purchased, if, after attainder, being liable to immediate forfeiture.—If before, to escheat as well as forfeiture (4).

Idiots and persons of *non sane memory*, *infants* and persons under *durefs*, are not totally disabled to convey or purchase, but *sub modo* only. The king on behalf of an idiot may avoid his grants (5). After several revolutions, and changes of opinion, it has been held, that a *non compos* may *stultify* himself, and avoid his acts (6); and clearly the next heir, or other person interested, may, after the death of the idiot, or *non compos*, avoid it (7). So, if he purchases under this inconvenience, and afterwards when he recovers does not agree to the purchase, his heir may either wave or accept the estate, at his option (8). In like manner, an infant may wave such advantages, when he comes of age; or if he does not then agree to it, his heirs may waive it after him (9). Persons who purchase or convey under *durefs*, may affirm or avoid, such

(3) Co. Litt. 42.

(4) Ibid. 2.

(5) Ibid. 247.

(6) Comb. 469. 3 Mod.

- 310, 311. 1 Eq. cases abr. 297. (7) Perkins, sect. 21.

(8) Co. Litt. 2.

(9) Ibid.

transaction, whenever the duress has ceased (10).

A *feme covert* may purchase an estate without consent of her husband, and the conveyance is good during the coverture, until he avoids it by some act declaring his dissent (11); and though he does nothing to avoid it, or even if he actually consents, the *feme covert* herself may, after the death of her husband, waive or disagree to the same; nay, even her heirs may waive it after her, if she dies before her husband; or if, in her widowhood, she does nothing to express her consent or agreement (12).—But the conveyance, or other contract (except by some matter of record) of a *feme covert*, is void (13).

AN *alien* may purchase, but he cannot hold it, except a lease for years of a house for convenience of merchandise, in case he be an alien friend*. All other purchases (when found on an inquest of office) being immediately forfeited to the king (14).

(10) 2 Inst. 483. 5 Rep. 119. (11) Co. Litt. 3.

(12) Ibid. (13) Perkins, sect. 154. 1 Sid. 120.

* See Hargrave's notes on Co. Litt. p. 3.—But by 14 and 15 C. II. c. 13. sect. 1. if they are protestants, and comply with the requisite, they may purchase lands, &c.

(14) Co Litt. 2.

Papists are, by 11 and 12 W. III.^b *disabled* to purchase any lands, rents, or hereditaments, and all estates made to their use, or in trust for them, are void. This is held to extend only to papists above the age of eighteen years; such only being absolutely disabled to purchase.—Yet the next protestant heir of a papist, under eighteen years, shall have the profits during his life, unless he renounces the errors within the time limited by law (15).

THE legal evidences of the translation or alienation of property, are called the *common assurances* of the kingdom; and are of four kinds. 1. By matter in *pais* or *deed*, which is an assurance transacted in the country, on the very spot to be transferred. 2. By matter of *record*. 3. By *special custom* in particular places. 4. By *devise*,—of which in their order.

^b Eng. stat. 1 Ann. c. 32. sect. 6,—10. and 15, 16. Irish stat. 2 Ann. c. 6. sect. 8, 9.—But, by 17 and 18 G. III. c. 49. sect. 1. they are enabled to take leases for nine hundred and ninety-nine years, or for any term of years, determinable upon any number of lives, not exceeding five, under the conditions therein mentioned; and they are also enabled to take any lands by descent, devise, or other transfer, which shall be in the possession of a papist.

(15) 1 P. Wms. 354.

C H A P. XX.

Alienation by *Deed*.

A DEED is a writing sealed and delivered by two or more parties, and differs from a *deed poll*, which has but one party. There should be as many parts as there are parties.

THE requisites are, 1st. It must be made by parties able to contract, and of a thing sufficient to be contracted for (2). 2nd. It must be made for *good* or *valuable consideration*.—*Good*, as from motives for kindred; *valuable*, as for marriage, &c (3). The former may be defeated in favour of a *bona fide* purchaser, or fair creditors^a. 3d. It must be *written*, and have the *stamps* imposed by law. A *parol* conveyance is only good when made for three years, and whereon two-thirds of the real value are reserved^b, unless reduced into writing by grantor, or

(1) Co. Litt. 171. (2) Ibid. (3) 3 Rep. 83.

^a 10 C. I. sess. 2. c. 3. sect. 1.—11 and 12 G. III. c. 8. sect. 7. in favour of the creditors of a bankrupt.

^b 7 W. III. c. 12. sect. 1. they shall have the force of leases at will.

his lawful agent. 4th. The matter must be legally, and should be orderly, set forth; the former, because it is to be construed by courts of justice (4); the latter, because as such, order having been practised for many ages; it is probably the most distinct and effectual.

THE usual order is, 1st. The *premisses*, wherein the names, titles, additions, &c. of the *parties*, and such deeds as may tend to illustrate the intention of the deed, and the consideration for which the deed is made, and also the certainty of the thing granted, is set forth.

2nd. and 3d. THE *habendum* and *tenendum*, The first of which is binding, if it does not contradict totally the estate granted in the *premisses*. The second is, by custom only, continued.

4th. THE *reddendum*, or other stipulations upon which the grant is made, which must usually be reserved to the grantor (5); as reserving rent, &c.

(4) Co. Litt. 225.

* Although the nature of the estate granted in each be different, yet they may both have force.—See Co. Litt. 21.

(5) Plowd. 13. 8 Rep. 71.

5th. THE *condition* may follow, if the estate granted depends on one; as, if a widow marries, the estate to revert.

6th. THE *warranty*, by which the grantor engages the peaceable, &c. enjoyment of the premises to the grantee.

7th, THE *covenants*; as quiet enjoyment, yielding rent, &c. If covenanter covenants for his heir, it is then binding on his real estate; if for executors and administrators, then on his personal also, provided either have assets,

8th. THE *conclusion*, which mentions the time of *execution* and *date of deed*; although they may be misrepresented, if the day of delivery can be proved (6).

9th. THE *deed* must be *read*, if any party requires it, else it is void in respect to him; or if any part be falsely read, so much is void, unless read with such intent; and then it shall be binding against the fraudulent party (7). It must be *sealed*; and also, by 29 C. II. c. 3^d. *signed*. It must also be *delivered*. It may be signed and sealed by

(6) Co. Litt. 46. Dyer 28. (7) 2 Rep. 3, 9.
11 Rep. 27. ^d 7 W. III. c. 12. sect. 1.

any person ; for the delivery makes it the deed of the party (8). The delivery must appear by the attestation of witnesses.

A DEED may be avoided, as well for want of any of the above requisites *ab initio*, as for matters happening *ex post facto*, as by *erasure*, or other *alteration*, in any material part, unless a memorandum be made thereof, at the time of alteration (9);—by breaking the seal, or defacing it (10);—by giving it up to be *cancelled*, or obliterated ;—by the disagreement of any person whose concurrence is necessary ; as the husband, where a *feme covert* is concerned, an *infant*, and such like ;—by judgment of equity, when it has been obtained by fraud, &c. or has been forged (11). In any of which cases, it may be avoided in part, or in the whole.

OF *deeds* at law, some are original, some derivative. The former are those by which estates are created. The latter, by which they are enlarged, restrained, transferred, or extinguished. There are six *original* ; feoffment, gift, grant, lease, exchange, partition :—and five *derivative* ; release, confirmation, surrender, assignment, defeasance.

(8) Perkins, sec. 30.

(10) 5 Rep. 23.

1 Vent. 348.

(9) 11 Rep. 27.

(11) Toth. num. 22.

A *feoff-*

A *feoffment* is the gift of any corporeal hereditament (12). If a feoffment is made to one, without expressing any estate, the grantee shall have an estate for life only (13), because his personal abilities are the reasons to be presumed, that induces the grantor.— But to make a deed of feoffment perfect, there must be also *livery of seisin*, without which the feoffee has but an estate at will (14), (formerly by delivery of corporal possession of the land); but now, by statute of uses^c, it may be effected by a fiction, supposing the land to have been already in the grantee. Livery of seisin is necessary in all estates for one or more *life* or *lives*, or of inheritance.

A *gift* is properly the creation of an estate tail, as feoffment is of an estate in fee; and lease of that for life or years.

A *grant* is the method to transfer the property of incorporeal hereditaments;— whereof no livery can be had (15).

A *lease* is a conveyance of lands, &c. for life, years, or at will. It must be for a lesser term than the grantor has, else it is an

(12) Co. Litt. 9.

(14) Litt. sect. 66.

(15) Co. Litt. 9.

(13) Ibid. 42.

^c 10 C. l. sess. 2. c. 1.

assign-

assignment. Livery of seisin is only incident to the first kind of lease.

IN general all persons may make leases for such terms as they are possessed of; but, by the disabling stat. 1 El. c. 19. 13 El. c. 10. 14 El. c. 11, 14. 18 El. c. 11. and 43 El. c. 29^f, all archbishops, bishops, &c.

^f 10 and 11 C. I. c. 3. sect. 1. such persons may make leases for twenty-one years, of lands, provided there is no other lease in existence, of which there is more than one year unexpired; that a moiety of the true value of said lands shall be reserved payable thereout annually; and so that they contain covenants of impeachment of waste.—17 and 18 C. II. c. 2. sect. 11. archbishops, &c. may make leases (of such lands as were granted to them in pursuance of the acts, for the better regulation of his majesty's declaration for the settlement of the kingdom) for the term of twenty-one years, or three lives, reserving a moiety of the improved yearly value.—12 G. I. c. 10. sect. 13. they may make leases for sixty years of bog or fenny lands appertaining to their demesnes, reserving like rent, provided there shall be three hundred acres of good land belonging to the demesne, and sufficient turbary; and such leases may be renewed for any term, not exceeding twenty-one years, reserving three-fourths of the full value at such renewal.—1 G. II. c. 15. sect. 12. rectors, &c. may lease any house or ground in cities or towns corporate, for a term not exceeding sixty-one years, reserving the full improved rent, and not commencing in future; and they may renew such leases for terms not exceeding forty years, if the former rent be not reduced.—15 G. II. c. 5. sect. 2. and 19 G. II. c. 16. sect. 1. archbishops, &c. may let all lands appurtenant to their demesnes, reserving two hundred and fifty acres.

all

all colleges, cathedrals, and other ecclesiastical and eleemosynary corporations; and all parsons and vicars are restrained from making leases for more than twenty-one years, or three lives from the making;—and unless the usual or more rent is reserved yearly. Houses in corporation or market towns may be let for forty years, provided they are not the *mansion houses* of the lessors^s; or have not more than ten acres of land adjoining to them; and provided the lessee is bound to keep them in repair.—And such houses may be aliened for lands of equal value in fee simple. If there is an old lease *in esse*, that will not expire within three years, no new lease shall be made to concur. No lease shall be made without the impeachment of waste. No bonds or covenants, to frustrate these provisions, shall be good (16). No such lease shall be good, without consent of the patron and ordinary, so as to bind the donor; yet it is good against the lessor, if a sole corporation; and against an aggregate corporation, so long as the head lives (17). Another restriction in regard to college leases, by 18 El. c. 6. one-third of the old rent shall be reserved in *wheat* or *malt*, or the lessee's payment; therefore the

^s 10 and 11 C. I. c. 2. sect. 7.

(16) Co. Litt. 44.

(17) Ibid. 45.

price which such article bore at the last market day, before rent become due.

ALso, by the enabling stat. 32 H. VIII. c. 28^h, tenants in tail have a right to make leases for twenty-one years, or three lives. Husbands in right of their wives, if they have estates in tail or fee, if they join them, can make the same leases; as also all persons having estates in fee, in right of their churches (except parsons and vicars) subject however to the following restrictions (18). 1st. The lease must be by indenture.—It must be made for no more than three lives, or twenty-one years, and not both; but it may be made for less. If an old lease is *in esse*, it must be surrendered, or within one year of expiring.—It must take effect from the day of the making it.—It must be of corporeal hereditaments, because no rent can be reserved out of things which lie in grant as the lessor cannot resort to distrein. But, by 5 G. III. c. 17. a lease of tithes, or other incorporeal hereditaments, may be granted by any ecclesiastical or eleemosynary corporation; and an action of debt will lie for recovery of the rent by the successor.—It must

^h 10 C. I. sess. 3. c. 6. sect. 1, 2. for a term not exceeding forty-one years, or three lives.

(18) Co Litt. 44.

have

have been commonly let for twenty years past; so if it have been let for above half time, either for life, for years, or at will, or by copy of court-roll, it is sufficient.—The most usual and customary rent for twenty years past must be reserved. It must not be made without impeachment of waste.

THERE is also another restraint on leases made by beneficed clergymen, by 13 El. c. 20. 14 El. c. 21. and 18 El. c. 11. which directs, that if a beneficed clergyman *shall absent* himself eighty days, in a year, from his living (unless he is a licensed pluralist; in which case, his curate forty days), he shall not only forfeit one year's profit to the poor, but all leases, made by him, of the profits of such benefice, and all covenants and agreements of that nature, shall be void ¹.

AN *exchange* is a mutual grant of interests, in which the word *exchange* is fundamentally requisite, and cannot be supplied by any other (19). The *estate exchanged* must be equal in quantity (20); not in value, but interest; as fee simple for fee sim-

¹ 10 and 11 C. I. c. 2. sect. 7. they shall remain in force for such time as the incumbent shall remain in his parish, without absenting himself eighty days in a year.

(19) Co. Litt. 50, 51.

(20) Litt. sect. 64, 65.

ple; twenty years for twenty years^{*}. It may be either of things that lie in grant, or in livery (21); but no livery of seisin is requisite (22); because each stands in place of the other, and each has already had livery of his own land. But entry must be made, else if either party die, the exchange is void, for want of sufficient notoriety (23). So, if two parsons exchange, and the one is presented, instituted, and inducted;—the other presented and instituted only; and one dies, the exchange is void (24).—So, if either party be evicted from the land, he has had in exchange on account of the other's bad title, the person so evicted, shall return to his former land, by virtue of an implied warranty.

A *partition* is, when two or more joint tenants, co-parceners, or tenants in common, agree to divide their lands; in which case it is necessary that they all mutually convey and assure to each other by *deed*.

A *release* is the conveyance of a man's right in lands, &c. to another, that hath

* By 15 and 16 G. III. c. 17. sect. 1. a doubt is removed, by which a tenant for life is enabled to exchange; as a glebe, or for a demesne for a master of a free school.

(21) Co. Litt. 51.

(22) Litt sect. 62.

(23) Co. Litt. 50.

(24) Perkins, sect. 288.

some former estate of the said lands in possession; and it may enure by, 1. *Enlarging an estate*, as if he who has the remainder shall release all his right in such remainder, to him that hath a lease for lives or years in possession; this gives him an estate in fee (25); but there must be some estate in possession, for the release to work upon; for if there be tenant for years, who has not entered on the lands before the lessor releases to him the reversion, such release is void (26). 2. By *passing an estate*, as when one of two co-parceners releases all her right to the other; this passeth the fee simple of the whole (27). In both these cases, the estates must be so related, that they make but one estate in law (28). 3. By *passing a right*; as if a man be disseised, and releaseth to his disseisor all his right, the latter thereby acquires a new right, and has a tortious estate changed to a lawful one (29). 4. By *extinguishment*; as if a tenant for life makes a lease for another life, remainder to a third person and his heirs; now if the person who created the first estate, releases to the tenant, his right to the reversion is extinguished, and it shall enure to the third person's remainder, as well as

(25) Litt. sect. 465.

(25) Ibid. 459.

(27) Co. Litt. 273.

(28) Ibid. 272, 273.

(29) Litt. sect. 466.

to the tenant's particular estate (30). 5. By *way of entry and enfeoffment*; as if there be two joint disseisors, and the disseisee releases to one, he shall be sole seised in exclusion of his companion, which is the same as if the disseisee had first put an end to the disseisin by entry, and then enfeoffed one of the disseisors (31). Here observe, if a man has in him the possession of the lands, he must convey by feoffment and livery; but if he has only a right, or a future interest, he may convey, by release, to him in possession.

A *confirmation* is nearly the same as a release; as where a voidable estate is made sure and unavoidable (32);—as if a tenant for life hath leased a term for a number of years, and dies before the term hath expired; (here, if the reversioner hath confirmed the estate to the lessee for years, before the death of the tenant for life, it is sure (33); or, whereby a particular estate is increased, which is the same as that species of release which operates by enlargement.

A *surrender* is the yielding up an estate to him that hath the immediate remainder

(30) Litt. sect. 470.

(31) Co. Litt. 278.

(32) 2 Inst. 292.

(33) Litt. sect. 516.

or reversion (34); in which it is observable, that the surrenderer must be in possession (35); and the surrenderee must have an estate greater, in which the estate surrendered may merge (36). In this case, there is no livery of seisin (37), because there is a privity of estate between the surrenderer and surrenderee of sufficient notoriety.

AN *assignment* is the transfer to another of a right one has in an estate, (usually applied to estates for lives or years).

A *defeasance* is a collateral deed made at the time with another conveyance, containing certain conditions, on performance of which, the estate, created by such conveyance, may be defeated.

THERE are yet a few other conveyances which have their operation by force of the *statute of uses*; or, as it is usually called, *the statute for transferring uses into possession*; 27 H. VIII. c. 10¹. which at present is of no use but to give efficacy to certain new and secret species of conveyance, introduced to save the trouble of making livery of sei-

(34) Co. Litt. 337.

(35) Ibid. 338.

(36) Perkins, sect. 581.

(37) Co. Litt. 50.

¹ 10 C. I. sess. 2. c. 1.

fin. This statute annihilated the intervening estate of the feoffee to uses, and turned the interest of *cestuy que use* into a legal, instead of an equitable, ownership. It withheld the land from being liable as heretofore to the dower, or curtesy, on account of the feisin of feoffee to use; and made them liable to dower, escheat, &c. of *cestuy que use*; and they were no longer devisable by will. Hence too, the judges determined that the use need not be executed the instant the conveyance is made, but that the operation may wait until the use shall arise on some future contingency; and in the mean time, the use shall remain in the grantor; which doctrine when devises were introduced and considered as equivalent in point of construction to declaration of uses, was adopted in favour of *executory devises*; as if land be conveyed to A. and B. after marriage, between them (38). This is a springing use; and here it must be observed, that unless there is a person seized to such use when the *contingency* or *springing use* happens, it cannot ever be executed: and therefore if the estate to the feoffee to such use, be destroyed by alienation, &c. before the contingency arises, the use is destroyed (39).—But in *executory devises* the

(38) 2 Rol. abr. 791. Cro. Eliz. 439.

(39) 1 Rep. 134, 138. Cro. Eliz. 439.

freehold is transferred to the future devisee. And in both these cases, a *fee* may be *limited* to take effect after a *fee* (40), which is contrary to the general rule). It is also held, that a use executed may change from one to another (41); as if A. makes a feoffment to the use of his intended wife, and her eldest son, for their lives; upon the marriage, the wife takes the whole use in severalty, and on the birth of a son, the *use is executed jointly* (42). This is called a *secondary, or shifting use*. And when the use limited by deed expires, or cannot vest, it returns to him who raised it, and is called a *resulting use*; as if A. makes feoffment to use of his intended wife for life, remainder to the use of her first son in tail; here, until he marries, the use results to him; after marriage, it is executed in his wife for life; and if she dies without issue, the whole results back in fee (43). It was also held against the strict rules of common law, that the uses originally declared, may be afterwards *revoked*, and new ones raised (44).—Such were the constructions of the statute by courts of law; but one or two technical scruples which the judges found difficult to

(40) Pollexf. 78. 10 Mod. 423. (41) Bro. abr. tit. feoffment al uses, 30. (42) Bacon of uses, 351.

(43) Ibid. 350. 1 Rep. 120. (44) Co. Litt. 237.

get over, threw the disposal of landed property in the court of chancery. They held, that no use could be limited on a use (45); as a feoffment to A. and his heirs, to the use of B. and his heirs, in trust for C. and his heirs was held to be executed only to the first use, and that the second was a nullity; whereas the court of equity determined it a trust which ought to be executed in conscience, although it was a use which the statute cannot execute (46). The judges also held, that as the statute only mentions such persons as were *seized* to the use of others, it did not comprehend terms of years, whereof the former is not seized, but *possessed* (47); as if a term of one thousand years be limited to the use of A.; this is not executed by the statute (48); whereas the court of equity determined as in the former case. Lastly, where lands are granted to A. and his heirs in trust, to receive and pay the profits to another; this is not executed by stat. for the land must remain in trustee to perform the trust (49). Thus by the strict construction of the courts of law, a statute made in the most solemn manner, has no effect, but to make a slight alteration in the

(45) Dyer 155.

(46) 1 Hal. p. c. 248.

(47) Bacon's law of uses, 335. Jenk. 244.

(48) Poph. 76. Dyer 369.

(49) 1 Eq. cas.

abr. 383, 384.

formal words of conveyance (50). However, the courts of equity now consider a *trust-estate* as governed by the same rules, and liable to every charge in equity which a use estate is subject to at law. The trustee can in no shape affect the estate, unless by alienation for valuable consideration, to a purchaser, without notice (51). The trust will descend,—may be aliened,—is liable to debts,—to forfeiture,—to leases, and other incumbrances,—nay, even to the curtesy of the husband. It has not been subject to dower, more from a cautious adherence to some hasty precedents, than from any well grounded principles (52). It hath also been held not to escheat, in consequence of attainder, or want of heirs (53), as the trust cannot be intended for the lord's benefit.

1st. The *first* of those conveyances, created by 27 Hen. VIII. c. 16. is a *covenant to stand seized to uses*; by which a man covenants in consideration of blood or marriage, that he will stand seized to the use of his wife, &c. for life in tail, or in fee. Here the statute executes the estate; for

(50) Vaugh. 50. Atk. 591. (51) 2 Freeman 43.

(52) 1 Chanc. rep. 254. 2 P. Wms. 640.

(53) Hard. 494. Burges and Wheate. Hil. 32 G. II. in chanc.

the party intended to be benefited having acquired the use, is thereby put into corporeal possession of the land, without seeing it (54).

—This deed can only operate for such weighty considerations, as blood, or marriage.

2nd. *Bargain and sale*; whereby the bargainer of some pecuniary consideration bargains or sells lands to the bargainee, by which bargain he becomes seized to the use of the bargainee; and then the statute of uses completes the purchase (55); or, the bargain vests the use, and then the statute vests the possession (56).

THESE conveyances, in the same session, 27 H. VIII. c. 16. in order to prevent clandestine bargains of freeholds, were ordered to be registered within six months, at Westminster hall, or with the *custos rotulorum* of the county.

BARGAINS and sales of chattel interests were, at this time, not regarded, and therefore not directed to be enrolled, which has therefore given rise to a *third* species of conveyance.

(54) Bacon's use of the law, 151.

(55) Ibid. 150.

(56) Cro. Jac. 696.

3d. By *lease* and *release*, which is now the more usual way. It is thus contrived; a lease, or rather a bargain and sale, for some consideration, is made for one year, to the bargainee;—this makes the bargainer stand seized to the use of bargainee, and vests in him the use for the term for one year, and the statute annexes the possession. Being thus in possession, he is capable of receiving a release of the reversion, which, as we have seen page 272. must be made to a tenant in possession. This supplies the place of livery, and therefore amounts to a feoffment (57).

4th. *Deeds to lead or declare the uses of other conveyances*,—of which, see the next chapter.

5th. *Deeds of revocation of uses*, which are founded in a previous power reserved at the raising of uses to revoke them, and raise others (58). See page 277.

HERE end the conveyances founded on statute of uses.

THERE yet remain three deeds, used not to convey, but to charge or discharge

(57) Co. Litt. 270. Cro. Jac. 604.

(58) Co. Litt. 227.

lands,

280 A COMPARATIVE VIEW of the
lands, viz. obligations,—recognizances,—de-
feasances.

AN *obligation*, or *bond*, is a deed whereby the obligor promises for him, his heirs, executors, and administrators, to pay a certain sum of money at a certain day. This is a *simplex obligatio*. Usually there is added a *condition*, that if the obligor performs some particular thing at or before such a time, then the obligation to be void. If for money, the obligation is commonly for twice the principal sum borrowed. This condition charges the obligor while living, and descends to his heir, who, on defect of personal assets, is bound to discharge it out of his real assets, if he has them by descent.

If the condition be impossible at the time of making, or contrary to some rule of law merely positive, or be uncertain, or insensible, it alone is void, and the obligation shall remain unconditional. If it be to do a thing *malum in se*, the obligation is void. If the condition be possible, when made, and then becomes impossible by the act of God,—of the law,—or of the obligee, then the penalty is saved (59). By 4 and 5 Ann. c. 16. altho' a suit be commenced

(59) Co. Litt. 206.

on an obligation, if tender be made of principal, interest and cost, it shall be full discharge and satisfaction.

A *recognizance* is an obligation of record, entered into before a court, or a magistrate (60), conditioned to do some particular act. This is an acknowledgment of a former debt,—an obligation, the creation of one *de novo*.—It is made to the king. Though it is not sealed by the party, and therefore not strictly a deed, yet in its effects it is greater, having a priority in payment; and binds the lands of the cognizor from the time of inrollment, by 29 C. II. c. 3. sect. 18^m.

A *defeasance* on an obligation, or recognizance, is a condition which, when performed, undoes it, as one of an estate, (page 273). It only differs from a condition of an obligation, in that it is executed by the parties by a separate, and frequently a subsequent, deed (61). It discharges the obligor, when the condition is performed.

(60) Bro. abr. tit. recog. 24. ^m 7 W. III. c. 12.
sect. 17. (61) Co. Litt. 237. 2 Saund. 47.

C H A P. XXI.

Alienation by Matter of Record.

ASSURANCES by *record* are such^{as} do not entirely depend on the act of the parties, but the sanction of a court of record is called in to be a perpetual testimony of the transfer of property from one man to another, or of its establishment when transferred. Of this nature are, *private acts of parliament,—king's grants,—fines,—common recoveries,*

Private acts of parliament are now a usual mode of conveyance; because, an estate by ingenuity or blunders may be so clogged with contingent remainders, &c. as to put it out of the power of the courts of law or equity to relieve the owner:—Because, it may happen by the strictness or omissions of settlements, the tenant of the estate is abridged of some reasonable powers (as making jointures, &c.) which cannot be given to him by the courts,—because it may be necessary to secure an estate against the claims of persons under legal disabilities, who are
not

not bound by judgments of any ordinary courts of justice.

THESE acts are referred to two judges to examine, and nothing is done without the consent of all parties capable to give it, who have the most remote interest, unless such consent shall appear to be perversely with-held. Usually an estate, or an equivalent in many, is settled on infants or persons not *in esse*, who are to be concluded by the act. A general saving is added to all persons (except those whose consent have been obtained). It is considered a private bill, and has been relieved when obtained fraudulently. It must be given in charge to a jury, else they, or a judge, are not bound to notice it.

King's grants are also matter of record. These, whether of lands, honours, &c. are contained in *letters patent* (open letters) with the *great seal* pendant at the bottom, and are directed to the subjects at large; and therein they differ from other letters sealed up with the *great seal*, but directed to particular persons, which, not being for public inspection, are closed and sealed on the outside, and thence called *writs close*. They must pass by *bill*, prepared by the attorney or solicitor-general, in consequence of a
warrant

warrant from the crown. Then they are signed at the top with the *sign manual*, and sealed with the *privy seal*. Sometimes they are sealed with the *great seal* (1). There are some grants that pass through certain offices; as the admiralty by a sign manual, without the *signet*,—the great or the privy seal.

THE manner of the construction of the king's grants are widely different from a subject's. A grant made by the king, at the suit of the grantee, shall be taken for the king, and against the party. But if the grant mentions it to be made *ex speciali gratia, certa scientia et mero motu regis*, it will meet a more liberal construction (2). A subject's grant shall be construed to include many things, not expressed, if necessary for the operation; as if a grant of the profits of lands for a year, egress, &c. is implied (3). But the king's grant shall not enure to any other intent, than what is expressly mentioned. When it appears the king is mistaken in matter of law or fact, or by misinformation, or false suggestion, or that his own title is different from what he supposed;—in any of those cases, the grant is void (4.) For

(1) 9 Rep. 18.

(2) Finch. l. 100. 10 Rep. 112.

(3) Co. Litt. 56.

(4) Freem. 172.

instance,

instance, if he grants to one and his heirs male, this is void, because it wants words of procreation to ascertain the body from which the heirs shall issue, and is not a fee simple, because it is reasonable to suppose the king meant to give but an estate tail (5). The grantee is therefore at most but tenant at will (6).

Fines are matter of record (7), and are reducible to three heads, or considerations.
1. The nature of a fine. 2. Its several kinds. 3. Its force and effect.

A *fine* is a solemn conveyance of record by which estates may be transferred without livery: or, it is an amicable composition of a suit usually commenced by fiction (tho' at first it was an actual suit) whereby the lands in question are acknowledged, or become the right of the demandant (8). It is so called, because it puts an end to all suits concerning the same lands.

THE manner in which it is levied is, 1st. That the party to whom the land is to be conveyed commences an action against the other, by suing out a *precipe*, called

(5) Finch, 101, 102. (6) Bro. abr. tit. estates, 34. tit. patents, 104. Dyer, 270. Dav. 45. (7) Co. Litt. 50.
(8) Ibid. 120.

a writ of covenant (9), founded on a supposed agreement, on the breach of which the action is brought. On this there is due to the king a *primer fine* of one-tenth of the annual value (10)^a. 2nd. Follows the *licentia concordandi*, or leave to agree to the suit, upon overtures being made by the defendant, which the plaintiff will not agree to, lest his pledges to prosecute may be endangered, without consent from the court which they grant; upon which is due another fine, called the *king's silver*, or *post fine*, with respect to the *primer fine*. This is as much, and half as much more, as is due on the *primer fine* (11). 3d. Comes the *concord*, which is (usually) an acknowledgment from the *deforciant*s (or those who keep the others out of possession) that the lands are the right of the complainants, and thence the party-levying the fine is called the *cognizor*; the other party, the *cognizee*. This acknowledgment must be made in court of C. B. or before one of its judges, or before commissioners in the country, appointed for the special purpose, who are all bound to take care that the cognizor is of

(9) Finch, l. 278. for another method of levying a fine.

(10) 2 Inst. 511.

^a By 2 stat. 2 H. IV. c. 8.

the chirographer shall take no more than four shillings for any fine levied.

(11) 5 Rep. 39. 2 Inst. 511.

Stat. 32 G. II. c. 4.

full age, sound memory, and out of prison. And if there be a *feme covert* cognizee, she is examined privately, whether she consents freely or by compulsion. Here the essentials of a fine are complete; and if the cognizor dies the next moment (if subsequent to the day of the return of the writ)⁽¹²⁾, still the fine shall be carried on. The next part is the *note of the fine*, which is an abstract of the writ and concord, naming the parties, the parcels of lands, and the agreement. —This must be rolled in the C. B. by 5 H. IV. c. 14. The last part is the *foot* or conclusion, which recites the parties, day, year, place, and before whom it is acknowledged. Of this there are *indentures* ingrossed at the *chirographer's* office, and delivered to the cognizor and cognizee.

By 27 Ed. I. c. 1. the note of the fine shall be read two several days in one week, openly in court. By 31 El. c. 2^b. the fine after engrossment shall be read and *proclaimed* in court one day in each of the term, and three succeeding terms after the fine is levied, which *four proclamations* are to be endorsed on the record. By 23 El. c. 3^c. the chirographer shall write, every term,

⁽¹²⁾ Comb. 7r.

^b 15 C. I. c. 2.

^c 10 C. I. sess. 2. c. 10. sect. 3.

the

the fines levied, and put them in an open part of the court for public inspection, and shall send a copy thereof to the sheriff of each county in which fines have been levied, to be put up in his court at the assizes.

OF *fines*, three are *executory*, one *executed*. The one *executed* is called, "*sur cognizance de droit, come ceo que il ad de sont done.*" It is the best and surest; for thereby the deforciant acknowledges a former feoffment, and livery, made by him to the plaintiff, thereby saving the trouble and formality of actual livery and feoffment (a livery thus acknowledged in court, being equivalent to an actual one).

OF the *executory*, the 1st. is a fine, "*sur cognizance de droit tantum.*" This is used to pass a reversionary interest; for of such reversion there can be no feoffment, with livery supposed, as the possession, during the particular estate, belongs to a third person (13). It is thus worded;—"That the deforciant, or cognizor, acknowledges the right to be in the plaintiff, or cognizee; and grants for him and his heirs, that the reversion, after the particular estate determines, shall go to the cognizee (14)".

(13) Mon. 629.

(14) West. symb. p. 2. sect. 95.
2nd.

2nd. A FINE, "*sur concessit*," which acknowledges no precedent right, but to end the dispute, grants an estate *de novo*; on which (being a new grant) a rent, &c. may be reserved (15).

3d. A FINE, "*sur done, grant, et render*," comprehends the two fines of "*sur cognizance de droit come ceo, &c.*" and "*sur concessit*;" and may be used to create particular limitations of estates; whereas the fine "*sur cognizance de droit come ceo, &c.*" conveys nothing but absolute estates of inheritance, or at least freehold (16). In this last fine of "*sur done, &c.*" the cognizee grants back to the cognizor, or some third person, some other estate in the premisses. The fine "*sur cognizance de droit come ceo, &c.*" is the most used.

THE effect and force of a fine depends on the common law, and 4 H. VII. c. 24. and 32 H. VIII. c. 36^a. By the former it is enacted, that the right of all *strangers* (which are all persons except privies and parties, who are barred by law) is barred, unless *they claim* within five years after proclamations made (except *feme-coverts*, in-

(15) West. p. 2. sect. 66.

(16) Salk. 340.

^a Eng. stat. 4 Hen. VII. c. 24. Irish stat. 12 C. I. sess. 2. c. 8. sect. 1,—4.

fants, prisoners, persons beyond the seas, and such as are not of sound mind) each of which have five years after they are released from these impediments, to make their claim. By the latter, any person of full age, to whom or whose ancestors lands have been entailed, may levy a fine, which shall be a perpetual bar to them and their heirs claiming by such entail, unless by a woman after her husband's death, of lands given her in tail; as jointure by him, or his ancestors; or, unless of lands intailed by act of parliament, or letters patent, whereof the reversion is in the crown.

Parties to a fine are the cognizors and cognizees, and are immediately barred, even though under legal impediment.

Privies, are such as are any way related to the parties, so as to claim by blood, or right of representation. Persons who have only a future interest, have also five years allowed them to claim after their right accrues (17).—But, by 4 Ann. c. 16. such action must be tried within one year after making claim. If tenant for life levies a fine, it is a forfeiture to the remainder man, if claimed in proper time (18); but if he

(17) Co. Litt. 372.

: 6 Ann. c. 10. sect. 16.

(18) Co. Litt. 251.

does,

does, and the claim is not made by the remainder man within five years after expiration of tenant's estate; such remainder man is for ever barred (19).

A *common recovery* is matter of record; and like fines is reducible to three heads; its origin,—its nature,—and its force and effect.

A *common recovery* was encouraged by 12 Ed. IV. to bar not only estates tail, but also remainders and reversions expectant thereon.

Its *nature* is, by action, to recover lands against the tenant of the freehold, which recovery binds all persons, and vests an absolute fee simple in the recoverer.

A *recovery* is an action carried on (tho' fictitious) through every stage, *e. g.* A. tenant to the freehold, desires to bar all entails, remainders, and reversions, and to convey it in fee to B.; for this purpose B. brings an action against A. for the lands, by writ, called *præcipe quod reddat*, (the operative words) wherein B. alledges that A. (*alleged tenant*) has no legal title, but came

(19) 2 Lev. 52.

in after C. had turned B. therefrom.—Then A. appears, and calls on D. (who is supposed to have warranted to him the title) prays that he may be obliged to defend the title he has so warranted.—On this, D. (now called the *vouchee*) appears, is impleaded, and defends the title; an imparlance with D. is then desired by B. which is allowed; after which B. returns to court, but D. the *vouchee*, disappears; whereon judgment is given for B. (now called the *recoverer*) to recover the lands against A. (now called the *recoveree*). And A. recovers judgment against D. the *vouchee*, for the value of the lands so warranted to him, and which he has lost by his non-appearance; D. being a man of no property, or *common vouchee*, cannot make any recompence to A.; (he is *recompensed* already by B. by his purchase); seisin hereof is delivered to B. by the sheriff, and this collusive recovery is a good conveyance of A. the tenant in tail, to B. in fee.

THIS is with a single voucher; usually there are two, or as the case may require more vouchers. By conveying an estate of freehold to any indifferent person, against whom the *præcipe* is brought, and then he vouches the tenant in tail, who vouches the common *vouchee*.

RECOVERY,

RECOVERY, brought against tenant in tail immediately, bars only such estate as he is then actually seized of; whereas, if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right which he may have in the premises (20). If A. be therefore tenant of the freehold in possession, and E. be tenant in tail in remainder; here A. doth first vouch E, and E. vouches D, the common vouchee who is always last vouched, and makes default. Thus B. recovers against A.—A. recovers against E. a *recompence of equal value*, and E. recovers the like against D.

Its force and effect. It bars (as was observed before) not only all estates tail, but remainders and reversions expectant thereon. By 34 and 35 H. VIII. c. 20. no recovery against tenant in tail of the king's gift, whereof the remainder or reversion is in the king, shall bar such estate tail, reversion, or remainder in the crown. By 11 H. VII. c. 20. no woman, after her husband's death, shall suffer a recovery of lands, settled on her by him, or on her and him by his ancestors. By 14 Eliz. c. 8. tenant for life

(20) Bro. abr. tit. tail, c. 32. Plowd. 8.

10 C. I. sess. 3. c. 11. sect. 2.

8 G. I. c. 6. sect. 12. 21 G. II. c. 11. sect. 1, 8.

cannot

cannot bar them in remainder or reversion. Therefore if tenant for life (with remainder in tail, and other remainders over) is desirous to suffer a valid recovery; either he, or the tenant to the *precipe* by him made, must vouch the remainder man in tail, else the recovery is void. The tenant to the *precipe* must be actually seized (21). Yet, by 14 G. II. c. 20^h. though the legal freehold be vested in lessees, yet those who are entitled to the next freehold in remainder or reversion, may be a good tenant to the *precipe*. Though the deed which made the tenant to the *precipe* is not entered, or regularly entered on record, yet after twenty years it shall be sufficient evidence on part of the purchaser, for valuable consideration, that recovery was duly suffered.

DEEDS to lead, or to declare the uses of fines and recoveries (the meaning of which have been referred here, from chap. 20). without which, the fines and recoveries would, like all other grants, be judged to enure to him who levies or suffers them (22); are in the first case, when made previous; and in the second, subsequent to the fines or recoveries.—As if A, tenant in tail, rever-

(21) Pigot, 28.
sect. 1,—5.

^a By 10 C. I. sess. 2. c. 1.
(22) Dyer, 18.

sion to himself in fee, would settle his estate on B. for life, remainder to C. in tail, remainder to D. in fee, which, by law, he cannot do, while his tail estate continues; he covenants to levy a fine, (or, if there are intermediate remainders) to suffer a recovery to E.; and that the same shall enure to such uses as are therein mentioned.— This is to lead the uses¹. Here, though E. is seized in fee by the fine or recovery, yet he shall be, by this deed, only stand seized to the use of B, C, and D. By 4 and 5 Ann. c. 16^k. *deeds to declare the uses of fines and recoveries*, made after they had been levied and suffered, shall be effectual, and the fine and recovery shall enure to such uses; although, by 29 C. II. c. 3^k. all trusts shall be declared in writing at (and not after) the time when the trust is created.

¹ 6 Ann. c. 10. sect. 15. ^k 7 W. III. c. 12.

CHAP.

C H A P. XXII.

Alienation by *Special Custom*.

ALIENATION by *special custom* is now confined to copyhold estates, and is generally done by *surrender*, which is the yielding up the tenant's estate to the lord, for the purposes expressed in the surrender:

It is given sometimes to the steward, in court, or out of court, or to two customary tenants (as the custom may be) by delivery of a rod or other symbol; as a resignation to the lord, to be again delivered out by him to such persons as are named in the surrender, and as the custom will warrant. Such surrender is *presented* at the next court, and then the lord by his steward grants the same land to *cestuy que use*, by delivering to the new tenant the rod or other symbol. On which he pays a fine; and takes the oath of fealty.

AFTER the surrender, the tenant cannot defeat his grant by disposing of the land in any other way, and the lord is compellable
to

to *admit* the new tenant, by bill in chancery (1), or mandamus.

IF the surrenderer dies before presentment, yet it is a good one to the new tenant (2). So too, if the new tenant dies before admission, his heir shall be admitted.

BEFORE admission the new tenant may be indicted for trespass if he enters on the land; but if it comes by descent, the heir is tenant of the copy immediately, if his ancestor had been admitted; yet, until he pays the fine, he cannot surrender, which, unless he pays within a short time after the death of his ancestor, he will incur the penalty of forfeiture (3).

IN copyholds, the lord can never raise the original rent, unless he changes the tenure to socage (4).

(1) Cro. Jac. 568. (2) Co. Litt. 62. 2 Rol. rep. 107. (3) Co. copyh. sect. 41. (4) Ibid.

C H A P. XXIII.

Alienation by *Devise*.

BY 32 H. VIII. c. 1. 34 H. VIII. c. 5. all persons are allowed to dispose of two-thirds of lands, by will and testament, in writing, (except *feme coverts*, infants, idiots, and persons of non-sane memory) held by particular tenures, which now by the alteration of tenures, by 12 C. II^a, amounts to all their property, except their copyhold estates. Corporations were by the two former statutes excepted; but now, by 43 El. c. 4. a devise to a corporation for a *charitable use* is valid, as an *appointment* rather than a bequest. And by its construction, that a devise of copyholds without surrender, to the use of his will (1), and a devise, or even settlement, by tenant in tail, are good by way of an appointment (2), without fine or recovery, to a charitable use.

* 10 C. I. sess. 2. c. 2. sect. 1, 30. to all persons except to bodies corporate.

(1) Moor, 890.

(2) 2 Vern. 453. Ch. prec. 16.

By 29 C. II. c. 3^b. all *devises* of lands and tenements shall not only be in *writing*, but *signed* by the testator, or some person in his presence, by his express direction, and also signed by three or four *credible witnesses*. The same solemnity is requisite to *revoke a will*.

In construction of these statutes it has been adjudged, that the testator beginning his will himself, "I, A. B. &c." is a sufficient signing (3): but the name at the bottom, is the safest way. The witnesses must all see the testator sign, or acknowledge the signing; yet they may witness at different times (4). But they must all sign in his presence, lest the instrument should be mistaken (5). By 25 G. II. c. 6^c. all legacies given to witnesses, are declared void. By same statute, creditors may be witnesses in such case, but their credit is left to the court and jury; and since it has been determined, that these creditors who were witnesses were credible, though the land was charged with the debts (6).

b 7 W. III. c. 12. sect. 5. (3) 3 Lev. 1.

(4) Freem. 486. 2 Ch. cal. 109. Pr. Ch. 185.

(5) 1 P. Wms. 740. 25 G. II. c. 11. sect. 1, 2.

(6) 4 Burr. sect. 430.

By 3 and 4 W. and M. c. 14^a. all wills, testaments, &c. of real estates, by tenants in fee simple, or having power to dispose by will, shall (as against creditors who have bonds and other specialties from the *devisor*, which affected the heir) be *void*; and such creditors may have their action jointly against the *heir* and *devisee*. A devise of real estates will only operate upon such as the testator had at the time of executing and publishing his will (7); wherefore, *by it*, no after-purchased estate will pass (8), unless subsequent thereto (9), the devisor *republishes his will* (10). But a testament of personal chattels will operate upon whatever the testator dies possessed of, (11).

THIS finishes our enquiry of every means by which lands and tenements may be transferred.—It will not here be improper to take notice of a few general rules laid down by courts of justice for the *construction* of them.

1st. THAT the construction be favourable, and as near the intention of the parties as the rules of law will admit (11).

^a 4 Ann. c. 5. sect. 1, 7.

(7) 1 P. Wms. 575.

(8) Moor, 255. 11 Mod. 127. (9) 1 Ch. cas. 39. 2

Ch. cas. 144.

(10) Salk. 238.

(11) And. 60.

"*Verba intentioni debent inservire*; and *benigne interpretamur chartas propter simplicitatem laicorum.*"—Therefore the construction must be also reasonable (12).

2nd. THAT *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* (13). But that where the intention is clear, too great a stress may not be laid on the signification of words; *nam qui haeret in litera haeret in cortice.* Therefore by grant of a reversion, a remainder may pass, and *e converso* (14).—Again, *mala grammatica non vitiat chartam* (15).

3d. THE construction is to be made upon the entire deed, and not on disjointed parts. "*Nam ex antecedentibus et consequentibus fit optima interpretatio*" (16). And therefore every part of it be, if possible made to take effect, and no word but may operate (17). *Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat* (18).

4th. THAT the deed be taken most strongly against the grantor, and for the other party. "*Verba fortius accipiuntur contra pro-*

(12) 1 Bulstr. 175. Hob. 304. (13) 2 Saund. 157.

(14) Hob. 27. (15) 10 Rep. 133. Co. Litt 223.

2 Show. 334. (16) 1 Bulstr. 101.

(17) 1 P. Wms. 457. (18) Plowd. 156.

"*ferentem.*"

"*ferentem*." This rule must be considered as to a deed poll (19); for in an indenture, the words are to be considered as of both parties. This being a strict rule, it should not be resorted to, until all other rules of exposition fail (20).

5th. WHEN words bear two senses, the one agreeable to, the other contrary to, law, that sense shall be preferred which is most agreeable thereto (21); as if tenant in tail makes a lease for life, this shall be construed for his own life.

6th. WHEN in a deed, two clauses are so repugnant that they may not stand together, the first shall be received, the latter rejected (22). In a will, the latter shall be received (23). The first deed, and the last will, are most available at law.—But, if possible, both clauses should be reconciled (24).

7th. THAT a devise be most favourably expounded, to follow the will of the deviser. Thus a fee may be conveyed without words of inheritance, and an estate tail without words of procreation. So, by a will, an estate

(19) Plowd. 134.

(20) Bacon's elem. c. 3.

(21) Co. Litt. 42.

(22) Hardr. 94.

(23) Co. Litt. 112.

(24) Cro. Eliz. 420.

may pass by *implication*.—As if A. devises land to his heir at law, after the death of his wife; here she has only an estate for life, by implication (25). If a devise is made of Black-acre to A. and of White-acre to B. in tail; if they both die without issue, then to C. in fee; here A. and B. have *cross remainders* by implication, and C's remainder shall be postponed until both their issues fail (26). But no cross remainders are allowed between more than two devises (27). And when implications are allowed, they must be such as are necessary (or at least, highly probable) not merely possible (28).

(25) 1 Ventr. 376.

(26) Freem. 484.

(27) Cro. Jac. 655. 1 Ventr. 224. 2 Show. 139.

(28) Vaugh. 262.

C H A P. XXIV.

Of Things *Personal*.

THINGS personal, not only include things *moveable*, but every thing comprehended under the name of *chattels* (1), which wanting duration as to time, and immobility with regard to place, (the criterions of real estates) must therefore be a *personal estate*, or *chattel*.

THESE are of two sorts; *chattels real*, and *chattels personal*. The former are such as favour of the realty (2); as terms for years of land, the next presentation to a church, or the like; which having immobility with regard to place, but wanting indeterminate duration, are therefore chattels real.

Chattels personal are more properly things moveable; as animals, jewels, &c.

(1) 1 Inst. 118.

(2) Ibid.

C H A P. XXV.

Of Property in Things Personal:

PROPERTY, in things personal, may be *in possession*; as where a man hath the actual enjoyment of the thing: or *in action*, where a man hath the right, and not the enjoyment.

PROPERTY in possession, is divided into *absolute* and *qualified*.

Absolute, is where a man hath the exclusive right, and also occupation, of moveable chattels; as goods, plate, money, &c. and which cannot be taken from him without doing an injury, which the law will prevent: with respect to animals, there is great difference.—They are distinguished into such as are *domitæ*; and such as are *feræ naturæ*:—some tame, and others wild. In the former, as sheep, &c. a man may have an absolute property, as well as in inanimate things. The stealing of such property

as this, is felony (1). But in *animals feræ naturæ*, a man can have no absolute property. Of tame animals, the brood belongs to the dam; for "*partus sequitur ventrem*," in the brute, though, for the most part, it is otherwise in the human species. Young cygnets are an exception to this rule, which belong equally to the owner of the cock and the hen (2).

Qualified property may subsist in *animals feræ naturæ*, either *per industriam*,—*propter impotentiam*,—or *propter privilegium*.

Per industriam. By reclaiming them by art, and confining them by industry.—As deer in a park; hawks that are fed and commanded by their owner; fish in a private pond, &c. Those no longer remain the property of a man, than while they continue in his possession, unless they have *animus revertendi* (3); as hawks pursuing their quarry; pigeons (especially of the carrier kind).—But if they stray without his knowledge, and do not return in the usual manner, then a stranger may take them (4). Though a deer, or any wild ani-

(1) 1 Hal. P. C. 511, 512.

(2) 7 Rep. 17. (3) Braët. l. 2. c. 1. 7 Rep. 17.

(4) Finch. l. 177.

mal, reclaimed, with a collar about his neck, or a wild swan, marked, still continues the property of the owner (5), unless they are absent a long time without returning. Bees are *feræ nature*, in which a man may have a qualified property when he *hives* them (6); until which time, he has no property in them. But a swarm that constantly fly in and out of his hive, still continues his property. Yet it is said, a qualified property may be had herein, in consideration of the soil (7) whereon they are found.

THOSE are under the protection of the law; and it is as much felony to steal such of them as are fit for food, as to steal tame animals (8). Such as are kept for pleasure, or whim (9), if taken, is an invasion of property, to be redressed by civil action (10). Yet to steal a reclaimed hawk, is felony (11). And the killing or stealing a cat, if it belonged to the king's household, and was the *custos horrei regii*, was a grievous crime, and subjected the offender to punishment.

(5) Crompt. of courts, 157. 7 Rep. 16.

(6) Bracton. l. 2. c. 1. sect. 3. (7) Bro. abr. tit. property, 37. cites 43 Ed. III. c. 24. (8) 1 Hal. P. C.

512. (9) Lamb. Eiren. 275. (10) Bro. abri. tit. trespass, 407. (11) 1 Hal. P. C. 512. 1 Hawk.

P. C. c. 33.

QUALIFIED property in animals *feræ naturæ*, may subsist *ratione impotentiae*; as when birds or hares burrow or make nests on my land, I have a property in the young ones, until they are able to go away, when I lose it; but till then, in some cases, it is trespass; in others, felony, for a stranger to take them away (12).

QUALIFIED property in animals *feræ naturæ*, may be *propter privilegium*;—as to hunt or kill them in exclusion of others.

QUALIFIED property may subsist in the elements. If the air of my house (13), the light of my antient windows (14), or my water (15) is diverted from me, darkened, or corrupted, the law will protect me in my possession.

THESE qualifications in property are not capable of having any absolute proprietor. But property may be of a qualified nature, in respect to the owner, although in itself capable of absolute ownership.—As if I deliver goods to a carrier, to convey to London; here the bailor hath only the right,

(12) 7 Rep. 17. Lamb. Eiren. 274.
Lutw. 92. (14) 9 Rep. 58.
1 Leon. 273. Skin. 389.

(13) 9 Rep. 59.
(15) 9 Rep. 58.

and not the possession; the carrier hath the possession, and only a temporary right.—Yet both have an action, if the goods be damaged or taken away (16). So goods distreined for rent, or other cause, which, at the taking, are not the absolute property of the distreinor, or of the party distreined.—But a servant who hath the care of his master's goods; as a butler, or shepherd, hath only a mere charge, and not a property, either absolute or qualified (17).

Property in action, is where a man hath but merely a right to occupy, from whence the thing to be recovered is called a *thing*, or *chose*, *in action*. Money due on bond, is a chose in action. If a man promises to do any act for me, and fails, whereby I suffer damage, the recompence is a *chose in action*. In the former case, the property depends upon an express contract. In the latter, upon an implied one.

THERE can be an action for every breach of contract, whether expressed or implied. But while the injury remains in suspense, it is but a *chose in action*.

(16) 1 Rol. abr. 607.

(17) 3 Inst. 108.

AFTER

AFTER having thus considered the quantity of property to which things personal are subject, we will now consider the time of their enjoyment, and the number of their owners.

FIRST, As to the time of enjoyment; a man may, by deed or will, limit his furniture, &c. to A. for life, *remainder* to B (18). But if an estate tail be given in things personal to the first, or any subsequent possessor, it vests in him an absolute property, and no remainder over shall be permitted (19); because the tenant in tail has no way of barring the entail, but this, which he would have in a real estate.

NEXT, As to the numbers of owners; things personal may be in severalty, joint-tenancy, or in *common*; but not in parcenary, because they do not descend from the ancestor to the heir. If a horse, &c. be given to two or more absolutely, they are *joint-tenants* thereof (20). If either sells his share, the remaining owner and the vendee

(18) 1 Equ. cases abri. 360. 2 Freem. 206.

* A court of equity will oblige the possessor, for life, to give security to the person in remainder, that he will not dispose of his chattels.

(19) 1 P. Wms. 290.

(20) Litt. sect. 282.

1 Vern. 480.

are tenants in common, without any *jus accrescendi* (21). So if one hundred pounds be given to two or more, to be equally divided between them, they are tenants in common (22). Stock on a farm, or in partnership, shall be considered in common, and not in joint-tenancy (23).

(21) Litt. sect. 321.

(22) 1 Eq. cases abr. 292.

(23) 1 Vern. 217. Co. Litt. 182.

C H A P. XXVL

Of Title to Things Personal by Occupancy.

TITLE to things personal may be acquired by twelve methods. 1st. *Occupancy*, which may be acquired, first, By seizing the goods of an *alien enemy* (1), for which there must be leave obtained from the crown (2); and which must have been brought into the kingdom after a declaration of war, without a pass-port. But the goods of an enemy brought in before war, cannot be seized (3). If an enemy take the goods of an Englishman, which are afterwards re-taken by another English subject, the former owner shall lose his property, after they have been brought into port, and remained *one night, intra presidia*, without being claimed. So a property may be acquired in the person of an enemy who is taken (4), until he is ransomed. Again, whatever moveables are found on the surface of the earth, or in the water, become

(1) Finch. l. 178. (2) Freem. 40. (3) Bro. Abr. tit. property, 38.—Forfeiture 57. (4) Ibid. tit. proprietie, 18.

the property of the first finder, unless they are estrays, wrecks, waifs, or hidden treasure; for these belong to the king. Thus too, the benefits of the elements can only be acquired by occupancy; water, &c. being of a fleeting nature.

WITH regard to animals *feræ naturæ*, all mankind have a qualified property in them (except such as restrictions are laid on by the municipal law, for the preservation of *game*) while living;—when dead, an absolute one. The restrictions by the law of England relate to whale and sturgeon, and to such terrestrial, aerial, and aquatic animals as are called *game*. All others may be taken by any subject, on his own lands. Also corn, &c. are species of property acquired by the possessor of land, who hath sown it,—distinct from the real estate; and subject to most of the incidents attending personal chattels. They shall vest in the executor, not the heir. They are forfeitable for outlawry, in a personal action (5). They may be, by 11 G. II. c. 19^a. distreined for rent arrears. But they are not the object of larceny, until severed from the ground (6).

(5) Bro. abri. tit. Emblem. 21. 5 Rep. 116.

(*) 7. W. III. c. 22. sect. 4. when severed from the ground.

(6) 3 Inst. 109.

PROPERTY arising from *accession* is grounded on the right of occupancy. If any corporeal substance receives an accession by growth or artificial means; as by the growth of vegetables, embroidering of cloth, pregnancy of animals; the original owner is intitled, by right of possession, to the property of it, under its state of improvement. But if the thing is changed into a different species, as by making wine out of grapes, &c. it belongs to the new proprietor, who is only to make satisfaction to the former one for the materials (7). If one take another's wife or son, and clothes them, and then the husband or father retake them, the garments shall cease to be the property of him who provided them (8).

If the goods of two persons are so *confused*, that the separate property cannot be ascertained, the proprietors have an interest in common, proportionably (9). But if one wilfully mixes his goods with another's, without approbation, the entire property, without any account, belongs to him whose original dominion is invaded (10).

(7) Bract. l. 2. c. 2 and 3. Bro. abr. tit. proprietie, 23. Moor. 20. Poph. 38.

(8) Moor. 214.

(9) 1 Vern. 217.

(10) Poph. 38. 2 Bullstr. 325. 1 Hal. p. c. 513. 2 Vern. 516.

THE title which an author hath in his own *literary composition*, is reducible to the head of occupancy. The identity of this depends entirely on the sentiment and language. The same conceptions, cloathed in the same words, must be the same composition. And no man can have a right to convey or transfer it without the author's consent, either tacitly or expressly had.— This consent may be tacit, when an author permits his work to be published without any reserve or right. But in a bargain for a simple impresson, or by sale or gift of the copyright, the reversion is continued in the original proprietor, or the whole property transferred to another.

It was determined by three judges against one, B. R. Pasch. 9 G. III. that an exclusive copyright in authors subsists by common law; but a writ of error was brought into the exchequer chamber^b. The court of

^b Since Sir W. Blackstone published the sixth edition of his commentaries, there has been an appeal to the house of lords from a decree of lord chancellor Appley on this subject, in the case of Donaldson ver. Becket and others, 26 February 1774, which decree was reversed; and it was determined by their lordships that the right of literary property claimed by the respondents did *not exist at common law*: In the arguments on this decision lord Appley

of chancery frequently grants injunctions to prohibit the invasion of this property.—

Some-

Appley was with the appellants, and declared he made the decree, as of course, in pursuance of the decision on literary right in the king's bench, where lord Mansfield, justice Aston and Willes against the opinion of Mr. justice Yates, gave judgment for the existence of common law property.—Vide 4 Bur. 2303. Lord Appley produced several original letters of dean Swift's to Mr. G. Faulkner, printer, shewing that the sense of the legislature at passing the 8th of Ann. c. 19. was against such common law right.—Lord Camden and chief justice De Grey with that energy and animation which usually are the attendants of clear perception, were on the same side of the question:—The former, fixing his eye upon lord Mansfield, said, "That excellent judge, lord-chief justice Lee, used always "ask the council, after his argument was over, *have you "a case?* I hope judges will always copy the example, "and never pretend to decide upon a claim of property, "without attending to the old black letter of our law; "without founding their judgment upon some solid written "authority preserved in their books, or in judicial records: "in this cause I know there is none such to be produced." Lord Mansfield did not speak, but his sentiments are fully reported in Bur. before cited. By this decision of the lords, literary property in England depends upon the stat. of Q. Ann; as there is no such statute in Ireland, no literary property exists here; and the judgment given in chancery in this kingdom in *Macklin's* case, is not against this decision of the English lords, Mr. Macklin not having published his manuscript, the language of which was stolen by a short hand writer from a stage representation.—It is remarkable, that the opinion of so consummate a lawyer and able judge as Sir William Blackstone has been exploded in both houses of parliament, on two of as important questions

Sometimes they are perpetual (11), and have related to unpublished manuscripts (12).— Sometimes to such antient books as do not come under the stat. of Anne (13.) There are many recognitions, by the legislature, of *copyrights*, 13 and 14 C. II. c. 33. 10 An. c. 19. sect. 112. 5 G. III. c. 12. sect. 26. There are also many adjudged cases at common law, which consider the crown as invested with prerogative copyrights^c (14).— And if the crown has an exclusive right in any book, the subject seems capable of having such right in another.— Besides, such

tions as were ever agitated in England touching constitutional and legal polity:—the one affecting the right of election; the other that of private property.

(11) *Knaplock v. Curl*. 9 November 1722. *Vin. abr. tit. Books*, pl. 3. *Baller v. Watson*, 6 December 1737.

(12) *Webb v. Rose*, 24 May 1732. *Pope v. Curl*. 5 June 1741. *Forrester v. Waller*, 13 June 1741. *Duke of Queensbury v. Shebbeare*, 31 July 1758.

(13) *Knaplock v. Curl*. before cited. *Eyre v. Walker* 9 June 1735. *Motte v. Faulkner*, 28 Nov. 1735. *Waltheoe v. Walker*, 27 Jan. 1736. *Tonson v. Walker*, 12 May 1739, and 30 April 1752.

^c This right, in regard of almanacks (which had been supposed to exist as a royal franchise) has been overturned in a cause between T. Carnan, and the university of Oxford, who claimed an exclusive right under the crown; and the tottering prerogative was attempted to be aided by a bill brought into parliament last sessions, which was rejected; therefore the subject hath now a right to publish almanacks.

(14) *Cart*. 89. 1 *Mod*. 257. 4 *Bur*. 661.

copy-

copyright as may subsist at common law, the 8 Ann. c. 19. hath, by additional penalties, protected the property of authors, and their assigns, for fourteen years; and if, at the end of that time, the author be still living, the right shall return to him for another term of fourteen years. A similar privilege is extended to the inventor of prints and engravings for twenty-eight years, by 8 G. II. c. 13. and 7 G. III. c. 38. 21 Jac. I. c. 3. allows a privilege for fourteen years to any inventor of a new manufacture, for the sole working and making the same (15).

(15) 1 Vern. 62.

CHAP.

C H A P. XXVII.

Title by Prerogative and Forfeiture.

THE second method to acquire a title to things personal, is by *prerogative*. Such are all tributes, customs, and taxes.—In these, if paid, the king has a *chose* in possession; if unpaid, a *chose* in action.

HITHER also may be referred all forfeitures, fines, and amercements due to the king, either by antient prerogative, or modern statutes.

IN those methods of acquiring property by prerogative, it is observable, that the king cannot have a *joint property*. If a horse be given to the king and a private person, the king shall have the sole property. If a bond be so made, the king shall have the whole (1). So if two persons have a horse or bond between them, and one assigns to the king, he shall have the whole (2). So,

(1) Fitzh. abr. tit. dette, 38. Plowd. 243.

(2) Cro. Eliz. 263. Plowd. 323. Finch. l. 178.
10 Mod. 245.

by

by prerogative, the king shall have all property in wreck, treasure-trove, in waifs, and such like. These are inherent in him, and derived to particular subjects as royal franchises, by his bounty. The right in the king is partly owing to the reasons in book I. chap. 8. and partly, because they are *bona vacantia*.

WITH regard to *copyright*, it is vested in the king for different reasons.—1st. He has, as executive magistrate, the right of promulging all acts of parliament. Hence he has the right of printing acts of parliament, proclamations, and orders of council. 2d. As head of the church, he has the right to print all liturgies and books of divine service. 3d. By purchase, he has a right to such law-books and grammars, &c. as were compiled or translated at the expence of the crown. On those two last principles the right of printing the Bible is founded. 4th. Almanacks are said to be prerogative copies *; either as things derelict, or as being only in substance, a calendar affixed to our liturgy (3).

THE property of such animals *feræ naturæ*, as are called *game*, are, by prerogative

* This hath been determined against the crown. See note (c) of chap. 26.

(3) 1 Mod. 257.

tive, vested in the king alone,—and from him derived to such subjects as have received a grant of a chase, a park, a free warren, or a *free fishery*. This right seems to have been thus vested: 1st. For the encouragement of agriculture, and improvement of land, by giving every one an exclusive dominion over his own soil. 2nd. For preservation of those animals, which would soon be extirpated by a general liberty. 3d. To prevent idleness in the lower class of people, which would follow from a general license. 4th. To prevent popular insurrections, by disarming the bulk of the people.

No person whatever, but he who has a grant from the crown of a royal franchise of *chase, park, free-warren, or free-fishery*, can, by the common law, kill any beast of chase, or other game, unless they are also beasts of prey.—Whereas any man who is exempted from the modern penalties, looks on himself at liberty to do as he pleases with game.—But, the contrary is strictly true, that no man, however well he may think himself qualified, can kill game, unless he can shew a *particular grant or prescription*, or some authority by act of parliament; such as 5 Ann. c. 14. which empowers lords and ladies of manors

to appoint game-keepers, to kill game for such lord or lady. All such wrong doers, although exempted from the penalties of the game statutes, are yet liable to actions of trespass by the owners of the land; and also if they kill game within any royal franchise, they are liable to an action by him who may have the right of franchise.

THOSE persons, who may lawfully kill game, have only a qualified property therein. If such a man starts game on his own ground, and follows and kills it on another's, the property remains in him (4). If another man starts game in a chase, and hunts it into another liberty, the property remains in the owner of the chase (5). If a man starts game on another's private grounds, and kills it there, the property is his on whose ground it is killed, because started there (6). Whereas if, after being started there, it is killed in the grounds of a third person, it belongs to him who killed it (7); because the property was local in the first person; and it was not started on the ground of the second.—But both owners of the ground have an action of trespass; and the lord of the franchise where it was started, has also an action.

(4) 11 Mod. 75.

(6) Ibid.

(5) Lord Raym. 251.

(7) Ibid. Farr. 18.

A THIRD method to acquire a title to things personal, is by *forfeiture*. They are numerous by special statute for particular crimes, in which only a particular part is forfeited.—As by 9 Ann. ten pounds for printing an almanack without a stamp.

Goods and chattels are *totally* forfeited on conviction of high treason; misprision of treason; petit treason; felony in general, but particularly felony *de se*; manslaughter; excusable homicide (8); by outlawry, for treason or felony; petit larceny; by flight in treason or felony, although the person be acquitted of the fact; standing mute, when arraigned of felony; drawing a weapon on a judge, or striking one in presence of the king's court; *præmunire*; pretended prophecies; on second conviction; owling; residing abroad of artificers; challenging to fight on account of money won at gaming.

FORFEITURE of personal chattels, commences from conviction of real property, from the time of committing the fact. A fraudulent conveyance of things personal, (to defeat the interest of the crown) between the commission of the fact and conviction, is void, by 13 El. c. 5.

(8) Co. Litt. 391. 2 Inst. 316. 3 Inst. 320.

C H A P. XXVIII.

Title by Custom.

THE *customs* which obtain pretty generally over most parts of the nation, are *heriots*, *mortuaries*, *heir-looms*.

1st. *Heriots* are of two sorts; *heriot service* and *heriot custom*. The former are due upon a special reservation in a grant or lease of lands, and are a mere rent (1). The latter are a customary tribute of goods and chattels, payable to the lord of the fee, on the decease of the owner of the land.—It is chiefly due on copyhold tenures. It is sometimes the best live beast; sometimes the best inanimate good, as a jewel, &c. It must be a personal chattel. The tenant must own it, therefore *feme covert* not having any property, is not liable to have it paid for her (2). It is, in some places, compounded for money, by custom (3).

(1) 2 Saund. 166. (2) Keilw. 84. 4 Leon. 239.

(3) Co. copyh. sect. 31.

2nd. *Mortuaries* are ecclesiastical heriots, being a customary gift due in many parishes to the minister, on the death of a parishoner^a. Through Wales, a mortuary was due upon the death of a clergyman, to the bishop; but, by 12 Ann. st. 2. c. 6. it is abolished, and a recompence given to him in its stead. So in Chester, but also abolished by 28 G. II. c. 6. and a recompence also given to the bishop.

THE king on the death of every bishop is entitled to a mortuary of six things:—his best horse or palfrey, with his furniture; his cloak or gown, and tippet; his cup and cover; his bason and ewer; his gold ring; and his *muta canum* (4).

ALL mortuaries to persons are ascertained by 21 H. VIII. c. 6.—any person that don't leave ten marks, nothing; that leaves above ten marks and under thirty, three shillings and four pence; above thirty and under

^a These are not due by law, but by custom, 2 Inst. 491.—Therefore they are not demandable in Ireland, unless a custom can be shewed; yet they are not unknown there; for, in Car. Hib. l. 19. c. 6. they are called, *Pretium sepulchri* and *sedatium*, viz. *omne corpus sepultum habet in jure suo vaccam et equum et vestimentum et ornamenta lecti sui*, &c.

(4) 2 Inst. 491.

forty,

forty, six shillings and eight pence; and above forty of what value soever, ten shillings, and no more.—No mortuary is due for any *feme covert*, child, or person of full age, that is not a house-keeper. A way-faring man's mortuary shall be paid in the parish to which he belongs.

3d. *Heir-looms* are such as, contrary to the nature of chattels, shall go by special custom to the heir, with the inheritance. They are such as cannot be severed from the freehold, without injury to it; but, in general, all chattel interests, although limited to the heir, shall go to the executors (5).

Heir-looms are deer in a park, authorized; pigeons, &c.; charters and deeds, &c. (6); chimney pieces, &c.; "*quod ad ædibus non facile revellitur*," shall pass to the heir (7); a monument in a church; the coat armour of an ancestor there hung up; for which the heir has an action against the parson, if he takes it away or defaces it (8). *Pews* in a church may, by immemorial custom, descend to the heir (9).—But if any person disturbs the body or ashes of an ancestor, the

(5) Co. Litt. 388.

(6) Bro. abr. tit. chat. 18.

(7) 12 Mod. 520.

(8) 12 Rep. 105. Co.

Litt. 18.

(9) 12 Rep. 105. 3 Inst. 202.

heir has no relief.—But the parson may have an action against him who disturbs the ground. And if any one, in taking up the dead body, steals the *shroud*, or other apparel, it is felony (10); for the executor, or whoever was at charge of the funeral, has the property.—The devise of an heir-loom, even by tenant in fee simple, is void (11).

(10) 3 Inst. 110. 12 Rep. 113. 1 Hal. p. c. 515.

(11) Co. Litt. 185.

CHAP.

C H A P. XXIX.

Title by Succession, Marriage, and Judgment.

TITLE by *succession* is applied to *corporations*; and any corporation, aggregate or sole (provided such sole is the representative of a number of persons; as the head of an hospital) (1), is capable of taking any lands or chattels, without naming their successors; and thus a lease or jewel will vest in the successors, as well as in the original members to whom it was given (2). But with a sole corporation, who represents only himself as bishops, parsons, &c. no chattel interest can go in succession. Therefore a lease of years, made to the bishop of Oxford and his successors, will go to his executors or administrators (3). For successors, when applied in a political capacity, is equivalent to heirs in a natural. And if made to him and his heirs, it would go to his executors. If allowed to go to succes-

(1) Dyer, 48. Cro. Eliz. 464.
estates, 90. Cro. Eliz. 464.

(2) Bro. abr. tit.
(3) Co. Litt. 46.

fors,

fors, it must be in abeyance at the death of the present owner, until his successor be appointed; and the law suffers not a chattel interest to be without an owner (4). Yet, the case of the king, who can take a grant of a chattel interest (5), and the case also of the chamberlain of London, who can take bonds and recognizances to himself and successors, for the benefit of the orphan's fund (6), are exceptions.

A TITLE may be acquired in goods and chattels by *marriage*, by which those chattels, which belonged formerly to the wife, are, by law, vested solely in the husband.

IN a real estate, he only gains a right to the profits during coverture, unless by birth of such a child as may inherit, he becomes intitled, by the curtesy of England. But unless he exercises some act of ownership over chattel interests, no property vests in him, but they remain in the wife or her representatives, after her coverture is determined.

A CHATTEL real vests in a husband *sub modo*.—As in lease for years, a husband may receive the rents, sell, or dispose of it at

(4) Brownl. 132.

(5) Co. Litt. 90.

(6) 4 Rep. 65. Cro. Eliz. 682.

pleasure (7); it is liable to his debts (8); and if he survives, it is to all intents his own (9).—But if he dies first, and has made no disposition thereof, he cannot dispose of it by will (10).—So it is also of chattels personal or *choses* in action,—these the husband may have if he reduces them into possession by law,—but if he dies before he has recovered them, they shall go to his wife (11).—So if an estray comes into the wife's franchise, and the husband seizes it, it becomes his absolutely, and he may dispose of it as he will: but if he dies without seizing it, his executors shall not seize it, but it shall go to the wife and her heirs (12).

BUT if the husband survives the wife, the cases in chattels real and *choses* in action are very different, for he shall have the power by survivorship, but not the latter (13), except in arrears of rent due to the wife before coverture, by stat. 32 H. VIII. c. 37.* —for the only means he had to require it, was by suing in her right, which he cannot now do; yet he may be her administrator, and as such, recover debts due to her.

(7) Co. Litt. 46.

(9) Ibid. 300.

(11) Co. Litt. 351.

(13) 3 Mod. 186.

sect. 1.

(8) Ibid. 351.

(10) Ibid. 351. Poph. 5.

(12) Ibid.

* 10 C. I. sect. 2. c. 5.

ALSO

Also a wife may gain a property in some of her husbands goods after his death, as her *paraphernalia*, or apparel, or ornaments suited to her rank, (over her dower or jointure) (14). The jewels of a peeress are *paraphernalia* (15).—Such things, though he may dispose of them in his life (16), he cannot devise by will, and she may retain them against all persons, except creditors, where there is a deficiency of assets (17).—And her necessary apparel are protected even against those claims (18).

A CHATTEL interest may be vested by judgment of law. Here a distinction must be observed between property, the right of which is before vested in the party, and of which possession only is recovered; and property, to which a man recovers the right as well as possession by judgment at law.—Of the former sort are *chofes* in action.—Of the latter are all penalties by particular statutes, as the penalty of five hundred pounds inflicted on persons in particular offices, who neglect to take the oaths to government; which penalty, is given to the *first* that *sues*. And the king, who before the

(14) Cro. Car. 343. 1 Rol. abr. 911. 2 Leon. 186.

(15) Moor, 213. (16) Noy's max. c. 49.—
Grahme. v. Lord Londonderry, 24 Nov. 1746. Canc.

(17) 1 P. Wms. 730. (18) Noy's max. c. 49.

action brought, might grant a pardon, cannot, after suit commenced, remit any thing but his part of the penalty (19).—But parliament may release the informer's interest. *Damages* given by a jury are also of the latter class when given for battery, slander, or the like; for when the damages are assessed, and judgment given thereon, the plaintiff then, and not before, acquires an instant right to that specific sum. Under this head may well be referred all costs and expences of suit which are in the determination of the courts; and may be therefore considered as an acquisition made by judgment of law.

(19) Cro. Eliz. 138. 11 Rep. 65.

C H A P. XXX.

Of Title by Gift, Grant, and Contract.

A GIFT or grant vests a property in possession,—a contract in action.

GIFTS are distinguished from grants; the former being gratuitous, the latter upon some consideration, and are divided into chattels real, and chattels personal.—Under the head of gifts and grants of *chattels real*, are all leases and other methods of conveying an estate, less than freehold, which are already considered in chap. 20. of this book.

GRANTS and gifts of *chattels personal*, are the act of transferring the right of them, which may be done by writing, or by word of mouth (1), attested by sufficient evidences of which delivery is the strongest. This conveyance, when voluntary, is usually construed fraudulent, if creditors or others become sufferers. By 3 H. VI. c. 4. all deeds of gift of goods made in trust to the use of

(1) Perk. sect. 57.

the donor, shall be void. By 13 El. c. 5¹. gifts and grants of chattels, as well as lands with intent to defraud creditors (2), shall be void against such to whom such fraud would be prejudicial; but against the grantor they shall stand good: and all persons partakers, or privy to such fraudulent grants, shall forfeit the whole value of the goods; one moiety to the king,—the other, to the party grieved; and shall suffer imprisonment for half a year.

A TRUE gift or grant is accompanied with delivery of possession; as if A. gives B. one hundred pounds, and puts him in possession. This is a gift executed, and the donor cannot retract, though given without consideration (3), unless it is prejudicial to creditors, or the donor was under some legal incapacity as *durefs*; or imposed on by false pretences, ebriety, or surprise.—But if possession be not given, it is then a *contract*, which one cannot be compelled to perform, but on good and sufficient consideration.

A CONTRACT conveys an interest in action, and is an agreement upon sufficient

^a 10 C. I. sess. 2. c. 3. sect. 1, 2. so far as respects lands.

(2) See 3 Rep. 82.

(3) Jenkf. 109.

consideration, to do or not to do a particular thing; from which definition there arises the agreement, the consideration, the thing to be done or omitted. It is an agreement, as where A. contracts with B. for one hundred pounds, and thereby transfers a property in such sum to B. which is in action; and as by common law no *chose* in action was transferable (4), so when it is assigned to a third person, it must still be sued in the original creditor's name. But the king may give or receive an assignment of a *chose* in action (5).

THE agreement may be expressed or implied. *Expressed*, when the terms are avowed at the time of making; as to deliver ten loads of hay.

Implied, as if I employ a man to do any work for me, the law implies that I undertook to pay him as much as his labour deserves; and if I fail in my part of the agreement, it is *implied*, that I shall pay such damages as the other sustains by reason thereof.

A CONTRACT may also be executed, as if A. agrees to change horses with B. and

(4) Co. Litt. 214.
chose in action, 1, 4.

(5) Dyer 30. Bro. abr. tit.

they

they do it immediately.—Or it may be executory, as if they agree to change next week. A *contract executed* (which is the same as a grant) conveys a *chose in possession*,—*executory*,—a *chose in action*.

A CONTRACT is, as has been observed, an agreement upon *sufficient consideration*.—The former part has been shewed. Now, as to the consideration, which must be a good or a valuable one.

A GOOD consideration is that of blood, or natural affection (6). This may be set aside when it tends to defraud creditors, or other third persons.

A VALUABLE consideration for money, or the like, can never be impeached at law; and if there be an adequate value, it is never set aside in equity.

VALUABLE considerations are divided into four species. 1st. *Do ut des*; as when I give money or goods on a contract, to be repaid money or goods for them. 2d. *Facio ut facias*; as if I agree to do work for a man, if he does work for me; or, that if A, the tenant, will repair his house; B.

the landlord will not sue for waste: or, if A. will, not trade to Lisbon, B. will not trade to Marseilles. 3d. *Facio ut des*; when a servant hires himself for certain wages, here he contracts to do his master's service, to earn that specific sum; otherwise, if he be hired generally, for then he is under an implied contract to perform this service for what it shall be really worth. 4th. *Do ut facias*; when I agree to give a servant such wages when he performs such work.

A CONSIDERATION is absolutely necessary to form a contract; for a *nudum pactum*, or agreement, to do any thing on one side, without any compensation on the other, is totally void (7). But any degree of reciprocity will prevent the *pact* from being *nude*.

THIS former rule doth not hold good in some cases (8), where the agreement is authentically proved by written documents; for a man shall not be allowed to aver the want of consideration where he enters into a voluntary bond (9), or gives a note (10), or the like. Courts of justice will support

(7) Dr. and St. 2. c. 24.

(8) Plow. 308, 309.

(9) Hard. 200. 1 Ch. rep. 157. (10) Lord Raym. 760.

both, as against the contractors, but not to the prejudice of creditors or third persons.

WE are next to consider the *thing agreed to be done, or omitted*. The most usual contracts by which chattels personal may be acquired are, 1st. *Sale*, or *exchange*. 2d. *Bailment*. 3d. *Hiring* and *borrowing*. 4th. *Debt*.

Sale is the transferring of goods for money.—*Exchange* is the commutation of *goods for goods*. When the vendor hath the property of the goods, he may dispose of them to whomsoever he pleases, unless judgment has been obtained against him, and the execution actually delivered to the sheriff.—Then the goods shall be bound to answer the debt from the delivery of the writ, by 29 C. II. c. 3^b. This is for the benefit of purchasers; for formerly they were bound from the *teste* (11), which is yet the law between the parties; for if a defendant dies after awarding, and before delivery of the writ, his goods are bound in his executor's hands (12). If A. agrees with B. for goods at a certain price, he may not take them until he pays for them; for it is no sale

^b 7 W. III. c. 12. sect. 8.

(11) 8 Rep. 171. 1 Mod. 188.
12 Mod. 5.

(12) Comb. 32.

without

without payment; unless the contrary be agreed. So if A. says the price is four pounds, and B. says he will give it, the bargain is struck, and neither may be off, if possession is tendered by the other party. But if the money be not paid, nor the goods delivered, nor tender made, nor any subsequent agreement, the owner may dispose of the goods as he pleases (13). But if even a penny is delivered by way of *earnest*, the property is absolutely bound by it, and the vendee may recover the goods by action, and the vendor the price of them^c (14).

By 29 C. II. c. 3^d. no contract for the sale of goods shall be valid to the value of ten pounds, or upwards, unless the buyer receives part of the goods; or, unless he gives part of the price to the vendor, as earnest, to bind the bargain, or in part of payment; or, unless some note be made by the party, or his agent, who is charged with the contract. With regard to goods, under

(13) Hob. 41. Noy's max. c. 42.

^c By 2 Ann. c. 15. sect. 12. no person that sells cattle in any fair, &c. shall be obliged to wait for the buyer (although earnest is given) above two hours; but he may sell them to any other person; and if he loses his market, he has an action against the buyer.

(14) Noy's max. c. 42. ^d 7 W. III. c. 12. sect. 17.

ten pounds, no contract for the sale of them shall be valid, unless the goods are to be delivered within a year, or unless the contract be in writing, and signed by the party who is to be charged therewith.

As soon as the bargain is struck, the property of the goods is transferred by the vendor to the vendee, but the vendee may not take the goods till he tenders the price (15): But if he tenders the money, and it is refused, the vendee may seize the goods, or have an action for detaining them. And by a regular sale, without delivery, the property is so absolutely vested, that if A. sells a horse to B. for ten pounds, and B. pays earnest, or signs a note of the bargain, and afterwards before delivery of the horse, or money paid, the horse dies in the vendor's custody, still he is entitled to the money (16).

PROPERTY may be transferred by sale, though the vendor hath none at all in the goods;—as all goods sold and contracted for in *fairs* or *markets overt*, shall be good between the parties, and also binding on all who have any right or property therein (17).

(15) Hob. 41.

(16) Noy's max. c. 42.

(17) 2 Inst. 713.

MARKET overt in the country is only held on the special days provided for by charter, or prescription. In London every day is market day (except Sunday) (18). The market place set apart by custom for the sale of particular goods, is in the country the only market overt (19). But in London, every shop is market overt for such goods as the owner professes to trade in (20). But if my goods are stolen, and sold out of market overt, I may take them wherever I find them.

By 1 Jac. I. c. 21. the sale of any goods wrongfully taken to any pawn-broker in, or within two miles of London, shall not alter the property. And even in market overt, if the goods be the property of the king, such sale will not bind him, though it binds infants, feme coverts, idiots, lunatics, or persons beyond sea. If the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still if the owner has used due diligence in prosecuting the thief to conviction, he does not lose his property in the goods (21). So, if the buyer

(18) Cro. Jac. 68.—And from the reasons in this case it should seem as if every town had the same allowance,

(19) Godb. 131. (20) 5 Rep. 83. 12 Mod. 521.

(21) Bacon's use of the law, 158.

knoweth

knoweth the property not to be in the seller; or, if there be any fraud in the transaction,—if he knew the seller to be an infant, or feme covert, not usually trading for herself. If the sale be not originally made in the fair or market, or not at the usual hours, the owner's property is not bound thereby (22). If a man buys his own goods in a fair or market, the contract of sale shall not bind him so as to render the price, unless the property had been previously altered by a former sale (23).—And notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into the possession of the goods, the original owner may take them when found in his hands who was guilty of the first breach of justice (24).

THE property in horses is not so easily changed.—For whatever price may be given, or how long soever the possession of the horse is kept before it be claimed, yet one gains no property therein if stolen, unless it be bought in a fair or market overt; nor even then, without conforming to the directions laid down by 2 P. and M. c. 7.

(22) 2 Inst. 713, 714.

(23) Perk. sect. 93.

(24) 2 Inst. 713.

and 31 El. c. 12^e. by which *every horse* so to be sold shall be openly exposed in the time of such fair or market for one whole hour, between ten in the morning and sunset, in the public place used for such sale.— That the horse shall be brought by the vendor and vendee to the toll-gatherer, or book-keeper; that toll be paid, if due; if not, one penny to the book-keeper, who shall enter the price, colour and marks, with the names, additions, and abodes of the vendor and vendee; the former, on his own knowledge, or testimony of some credible witnesses. And even these precautions shall not take away the property of the owner, if within six months after the horse is stolen, he puts in a claim before the mayor or justice of the district in which the horse shall be found, and in forty days after prove his property by the oath of two witnesses, and also tenders the person in possession such price as he *bona fide* paid. But if any one point be omitted in the sale, it is utterly void; and the owner may, at any distance of time, seize, or bring an action for his horse, wherever he finds him.

A PURCHASOR may have satisfaction of the seller, if he sells goods as his own, and

* 4 Ann. c. 11. sect. 1, 2, 3.

the

the title proves deficient, without any warranty expressed (25). But the vendor is not bound to answer, unless he expressly warrants them to be sound and good (26); or unless he knew them to be otherwise, and used any fraud to disguise it (27); or, unless they turn out different from what he represented them.

Bailment is the delivery of goods on trust, on a contract expressed or implied that it shall be faithfully executed on the part of the bailee; as if cloth be delivered to a taylor, he has it on an implied contract to render it back, made in a workman like manner (28). If a man takes a horse, &c. to depasture on his grounds (called *agistment*) it is on a contract to return it on demand (29). So a pawn-broker, and the like. If a friend delivers any thing to a friend to keep for him, the receiver is bound to return it on demand. A general bailment will not charge the bailee, unless the loss happens by gross neglect. But if he specially undertakes to keep the goods safe and secure, he is bound to answer all damages for want of that care which a prudent man would use (30).

(25) Cro. Jac. 474. 1 Rol. abr. 90. (26) F. N. B. 94.

(27) 2 Rol. rep. 5. (28) 1 Vern. 268.

(29) Cro. Car. 271. (30) L. Raym. 909. 12 Mod. 487.

Hiring and *borrowing* differ only, that the former is for a price, the latter is merely gratuitous. They both give a qualified property to the possession. Thus if a man hires or borrows a horse for a certain time; at the expiration thereof his qualified property determines, and the owner becomes intitled to receive back his property and (in hiring) his price also (31).

THERE is one species of this, the most usual of any, called *interest*, by those who think it lawful, and *usury* by those who do not think so. The exorbitance or moderation depends on two circumstances; the inconvenience of parting with the money, and the hazard of losing it entirely. If there is no inconvenience, there should be no interest, but what is equal to the hazard; so if there be no hazard, there ought to be no interest, but what arises from the inconvenience of *lending*.—Thus if the quantity of specie in the kingdom be such that the inconvenience of lending for a year is computed at three per cent. A man that has money will lend it on good personal security at five per cent. allowing two per cent. for the hazard run. On landed security, at four per cent. the

(31) Yelv. 172. Cro. Jac. 236.

hazard being less; and to the state, at three per cent. the hazard being none at all.

SOMETIMES hazard is greater, whence arises, 1st. *Bottomry*, or *respondentia*. 2nd. *Policies of insurance*. *Bottomry* is where the owner of a ship takes up money to enable him to carry his voyage on, and pledges the bottom of the ship (*pars pro toto*) as security for the repayment. If the ship be lost, the lender loses all his money:—If the ship be brought home, it and the tackle, as well as the person of the borrower is answerable. If the loan be on the goods, and not on the vessel, then the borrower is only answerable, and is said to take up money at *respondentia*. These terms are applied where-ever the money is borrowed, not on the ship and goods only, but on mere hazard of the voyage; as when a man lends one a thousand pounds to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case the voyage be safely performed (32), which kind of agreement is called *fœnus nauticum*, and sometimes *usura maritima* (33).

(32) 1 Sid. 27.
Malynes lex mercat. b. 1. c. 31.

(33) Molloy de Jur. Mar. 361.

By 19 G. II. c. 37. where the vessels are bound to or from the East Indies, all money lent on bottomry or respondentia shall be on the ship or merchandize only.—That the lender shall have the benefit of salvage; and that if the borrower has not on board, effects to the amount of the sum borrowed, he shall be responsible to the lender for so much as he has not laid out with legal interest, and all charges, although the ship be lost.

2d. *Policy of insurance* is a contract between A. and B. that upon A's paying an equivalent for the hazard run, B. will indemnify him. This has the doctrine of interest as to hazard, but not inconvenience, because the money is not advanced till the loss actually happens. By 19 G. II. c. 37. all insurances, interest or no interest, (which is insuring sums without having property on board) or without farther proof of interest than the *policy*, or by way of gaming or *wagering*, or without benefit of salvage to the insurer, shall be totally void, except on privateers, or ships in the Spanish and Portuguese trade.—That no re-assurance shall be lawful, unless the former insurer shall be insolvent or dead. And that in the East India trade, the lender on bottomry or respon-

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respondentia shall alone have a right to be insured for the money lent, and the borrower shall recover no more on any assurance than the surplus of his property, above the value of the bottomry or respondentia bond.

IF a contract be made which carries interest in a foreign country, payment must be made according to the rate of interest in that country (34).

THE last species of contract is *debt*, whereby a *chose* in action is mutually acquired and lost (35). It is chiefly divided into debts of record, debts by special, and debts by simple contract.

A *debt of record* is, where it appears due by the evidence of a court of record; as when a sum is adjudged due on a suit at law.

RECOGNIZANCE is money acknowledged to be due to the crown; or a subject, in presence of a court or magistrate.

(34) 1 Eq. cases abr. 289. 1 P. Wms. 395.

(35) F. N. B. 119.

Debts by specialty, are such whereby a sum of money is acknowledged to be due by deed under seal; as a bond, lease, or the like.

Debts by simple contract arise by mere oral evidence, or by note unsealed. By 29 C. II. c. 3. no executor or administrator shall be charged by any special promise to answer damages out of his own estate. And no person shall be charged on any promise to answer the debt of another; or on any agreement in consideration of marriage, or on any contract of sale of a real estate; or on agreement that is not to be performed within a year, unless the agreement be in writing, and signed by the party; or by some one by his authority.

BILLS of exchange, and promissory notes, demand more particular regard. A *bill of exchange* is a letter by A. to B. desiring him to pay a third person a sum of money on his account. The person who writes this letter is called the drawer; he to whom it is written, the drawee; and the third person, the payee.

' 7 W. III. c. 12. sect. 4.

THESE

THESE bills are either *foreign* or *inland*.—Foreign, when drawn by a merchant here, on one abroad, or *vice versa*.—Inland, when the drawer and drawee reside in the kingdom. Formerly the former were more regarded; but, by 9 and 10 W. III. c. 17. and 3 and 4 Anne, c. 9. they are on the same footing.

Promissory notes are a direct engagement in writing, to pay a sum therein named to a person (or, as may be, his order). These, by 3 and 4 Anne, c. 9^s. are assignable, as bills of exchange. The payee may, by writing his name *in dorso*, assign over his whole property to bearer, or to any person by name, who may assign to another *in infinitum*. And a promissory note to A. or bearer, is negotiable without *any indorsement*, and payment may be demanded by any bearer (36). But in a bill, the payee or indorsee is to offer it for *acceptance*, which may be done either verbally, or in writing^h; by which the drawee makes himself liable to pay it (37); but it must be accepted in

^s 8 Anne, c. 11. sect. 9.

(36) 2 Shower. 235. Grant v. Vaugh. T. 4. G. 3. B. R.

^h 8 Anne, c. 11. sect. 1, 4, 5. in writing only.

(37) Stra. 1000.

writing

writing under, or on the back of the bill, to make the drawer liable to costs.

IF the drawee refuses to accept the bill, if for twenty poundsⁱ, or upwards, and that it is expressed to be for value received, the payee or indorsee may *protest* it for non-acceptance, by some notary; and if no such be resident in the place, then by any substantial person, in presence of two credible witnesses; of which the drawer must have notice within fourteen days. If it be accepted, and the drawee refuses to pay it within three days after it becomes due, (which *three days* are called *days of grace*) it must then^k be protested, as before, for non-payment; and must be also notified within fourteen days, to the drawer, who, on producing such protest for non-acceptance, or non-payment, is bound to make good not only the amount thereof (which he is bound to do without any protest, in a reasonable time, by the common law (38), but all interest and charges from the time of making such protest. But if no protest

ⁱ 8 Anne, c. 11. sect. 1, 2. five pounds or upwards.

^k 8 Anne, c. 11. sect. 5. inland bills may be withheld from protest until the fourteenth day after expiration of the three days.

(38) Lord Raym. 993.

be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill.

WHEN refused, it must be demanded of the drawer as soon as conveniently may be. If it be an indorsed bill, and the drawer cannot be got to discharge it, the indorsee may call on either the drawer or the indorser to pay it.—And if there are many indorsers, he may call on any of them.

C H A P. XXXI.

Title by Bankruptcy.

A BANKRUPT is a trader who secretes himself, or does certain other acts tending to defraud his creditors.

WE have seen, in chap. 18. of this book, so far as related to the transfer of the real estate of a bankrupt. Here we are to treat of the disposition of his chattels. By 13 El. c. 7^a. bankruptcy is confined to persons using the trade of merchandize in gross, or in retail, by way of bargaining, exchange, bartering, *chevisance* (that is, making contracts) or otherwise; or who have sought their living by buying or selling. By 21 Jac. I. c. 19^b. *scriveners*, receiving other mens money and estates in their trust and custody, are made liable to the statute of bankruptcy. And the benefits, as well as penalties thereof, are extended to aliens and denizens. By 5 G. II. c. 30. sect. 39^c. *bankers, brokers, and factors*, are made liable

^a 11 and 12 G. III. c. 8. sect. 1.

^b Ibid.

^c Ibid.

to the statute.—But no ^d farmer, grazier, or drover, can (as such) be deemed a bankrupt, sect. 40. A receiver of the king's taxes is not capable (as such) to be a bankrupt.

By the same statute, sect. 23 ^e. no person can have a commission awarded against him, unless at the petition of one creditor, to whom he owes one hundred pounds; or two, to whom he owes one hundred and fifty pounds; or of more, to whom together he owes two hundred pounds.

It has been held, that buying and selling only, will not qualify a man to be a bankrupt, unless he gets a livelihood by it. No handicraft occupation will make a man a bankrupt; as a husbandman, and the like (1).
 * An innkeeper (as such) cannot be a bankrupt (2), because his livelihood arises more from the use of his rooms and attendance: Neither can a schoolmaster (3). But if persons buy goods, and make them into saleable commodities (as shoemakers) they may be bankrupts (4). One single act of buying

^d 11 and 12 G. III. c. 8, sect. 2.

^e Ibid. sect. 1.

(1) Cro. Car. 31.

(2) Ibid. 549. Skin. 291.

(3) 3 Mod. 330. Skin. 292.

(4) Cro. Car. 31.

Skin. 292.

and

and selling will not make a bankrupt, but repeated ones, and profit by them. Buying and selling bank-stock will not make a bankrupt (5); neither will buying or selling under particular restraints, or for particular purposes; as if a commissioner of the navy buys victuals for the fleet, and sells the surplus (6). An infant cannot be a bankrupt; but a *feme covert* may be one, in London, by custom (7).

A MAN may become a bankrupt, by departing from the realm, with intent to defraud his creditors;—by keeping his own house privately, so as not to be seen or spoken to by his creditors, except for just and necessary causes: both which are by 13 El. c. 7. By 1 Jac. I. c. 15, departing

(5) 2 P. Wms. 308.

(6) Skin. 292. 1 Salk. 110.

(7) *La vie v. Phillips*, M. 6. G. III. B. R.

11 and 12 G. III. c. 8. sect. 1. The same several acts amount to a commission of bankruptcy, and the whole law seems to correspond, except where noted here:—If the creditor shall suffer himself to lie in gaol, he shall be deemed a bankrupt from the day of the arrest, sect. 11.—If after commission issued, the bankrupt gives any money, &c. to the person who sued it out, so that such person shall receive a larger dividend than the other creditors, the commission shall be superseded, but such shall be deemed an act of bankruptcy, and a new commission may issue, under which, such creditor shall be barred from all right to receive any payment.

from his own house with intent to secrete himself and defraud his creditors,—procuring or suffering himself willingly to be arrested, outlawed, or imprisoned, without just and lawful cause,—procuring his money, goods, chattels, and effects to be attached or sequestered by any legal process,—making any fraudulent conveyance to a friend or secret trustee of his lands, tenements, goods, or chattels.—By 21 Jac. I. c. 19. procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests,—by endeavouring, or desiring, by petition to the king, or bill exhibited in any of the courts, against any creditor, to compel him to take less than his just debts, or to procrastinate the time of payment originally contracted for,—lying in prison for two months, or more, on arrest or other detention for debt, without finding bail to obtain his liberty,—escaping from prison after an arrest for a just debt of one hundred pounds, or upwards. By 4 G. III. c. 33. neglecting to make satisfaction for any just debt to the amount of one hundred pounds, within two months after legal process, upon any trader, having privilege of parliament.

It has been determined, that a man's moving his goods privately, to prevent their being

being seized in execution, was no act of bankruptcy (8)*, for the statute only mentions, fraudulent gifts to third persons, and procuring them to be seized by sham process. So it has been determined, that a banker's stopping payment is no act of bankruptcy; and if he is arrested, and puts in bail, still it is no act of bankruptcy (9): but if he goes to prison, and lies there two months, then, and not before, he is a bankrupt.

THE proceedings on a commission of bankruptcy are, first, There must be a *petition* to the lord chancellor, by one creditor (or more, being partners) whose debt amounts to one hundred pounds; of two creditors, of one hundred and fifty pounds; or of three or more, whose debts amount to two hundred pounds; and an affidavit of the truth of the respective debts:—upon which he grants a *commission* to such persons

(8) Lord Raym. 725.

* This determination appears to be of no avail under the Irish bankrupt law, because the statute mentions, sect. 1. "or their goods, &c. to be attached, sequestered, or taken in execution, or make, or cause to be made, any fraudulent grant or conveyance of their lands, &c. to the intent "or whereby their creditors may be defeated or delayed "from recovery, &c."

(9) 7 Mod. 139.

as he pleases.—The petitioners enter into a bond of two hundred pounds to make the party amends if they do not prove him a bankrupt^b. And if they have received any money or reward from the bankrupt to sue out the commission, they shall forfeit not only such money, but also their debt.

THE commissioners are to meet at their own expence, and to take an oath for the due execution of their commission, and are to be allowed a sum, not exceeding twenty shillings a-day each, at every sitting.—And no commission of bankrupt shall abate by any demise of the crown.

THE commissioners are first to receive proof of the person's being a trader, and having committed some act of bankruptcy; then to declare him a bankrupt (if so proved), and to give notice in the Gazette, and appoint three days of meeting.—At one of these meetings, *assignees* must be chosen by the major part in value, of the creditors, who shall then have proved their debts,—but they may be originally appointed by the commissioners, and afterwards approved or rejected by the creditors. No creditor shall

^b 11 and 12 G. III. c. 8. sect. 10. and unless they prove their debts before the commissioners, or at a trial at law, if such may be.

be admitted to vote for assignees whose debt, on a balance, does not amount to ten pounds.

At the third meeting at farthest, which must be on the forty-second day¹ after advertising in the gazette, the bankrupt, upon notice also personally served on him, or left at his usual place of abode, must *surrender* himself to the commissioners, and must thenceforth conform himself to the directions of the statutes; or in default, shall be guilty of felony, without benefit of clergy, and shall suffer death; and his goods and estates shall go among his creditors. If he absconds, or is likely to run away between the commission issued and the last day of surrender, he may be apprehended, and *committed* to the county goal².—And the commissioners are empowered immediately to grant a warrant to seize his goods and papers.—The warrant for his person must be by a judge, or justice of the peace.

¹ 11 and 12 G. III. c. 8, sect. 26. the lord chancellor may enlarge the day for surrendering, for a time not exceeding fifty days, to be computed from the forty-second day, such order for enlargement being made six days at least before the time the bankrupt was to surrender.

² Ibid. sect. 30. Upon proof of the commission being issued, and the person proved a bankrupt, it shall be lawful to grant the respective warrants.

THE commissioners are to *examine* him, touching all matters of his trade and effects. They may also summon his wife, or any other person, and examine them as to his affairs. If any of them refuse to answer, or do not answer fully to any lawful question, or shall refuse to subscribe to such examination, the commissioners may commit them without bail, till they make and sign a full answer; in which committal, the question, so refused, must be specified.—And any goaler suffering an escape, shall forfeit five hundred pounds¹ to the creditors.

THE bankrupt is bound, on pain of death, to make a full discovery of all his estates and effects in expectancy and possession, and how he has disposed of the same, together with all books and writings relating thereto; and to deliver up all in his own power to the commissioners (except his, his wife's and children's necessary apparel.) If he conceals any effects to the amount of twenty pounds, or with-holds any books or writings, with intent to defraud, he shall be guilty of felony, without the benefit of clergy.

¹ 11 and 12 G. III. c. 8. sect. 36. three hundred pounds.

AFTER the time allowed to the bankrupt for discovery is expired, any person discovering any part of his estate before unknown, shall receive five per cent. of such effects, and such farther reward as the assignees shall think fit.

ANY trustee who wilfully conceals any estate of the bankrupt after the forty-two days, shall forfeit one hundred pounds, and double the value of the estate concealed, to the creditors.

IF the creditors of the bankrupt, or four parts in five of them, in number and value (but none of them creditors under twenty pounds), will sign a *certificate* of the *bankrupt's* having made an ingenuous discovery, having conformed to the direction of the law, and having acted in all points agreeable to them; the commissioners are then to sign such certificate under their hands and seals, and to send it to the lord chancellor, and he, or two judges whom he may appoint, on oath, made by the bankrupt, that the certificate was obtained without fraud, may *allow* or *disallow* it on cause shewed by any of the creditors. If no cause is shewed, the certificate is allowed of course, and then the bankrupt is entitled to a decent

cent allowance out of his effects^m. If his effects will not pay ten shillings in the pound, he is left to his commissioners and assignees to allow him a sum, not exceeding three per cent. If they pay ten shillings in the pound, he is allowed five per cent. If twelve shillings and six pence in the pound, then seven and an half per cent. If fifteen shillings in the pound, then ten per cent. provided such allowance does not in the first case exceed two hundred pounds;—in the second, two hundred and fifty pounds;—and in the third, three hundred pounds. He has also an indemnity granted to him of being free, and discharged of all debts owing by him when he became a bankrupt, even though he lies in prison upon execution.

If any creditor produces a fictitious debt, and the bankrupt does not make discovery, he loses all these advantages.—So likewise, if he ever has given above one hundred pounds, as a marriage portion, with any child, unless at that time he had effects to

^m 17 and 18 G. III. c. 48. sect. 1, 2. If it appears to the major part of the commissioners, that the bankrupt hath not fairly and honestly kept and entered in his books of account, all his dealings and transactions, or that he hath not made out an inventory, once in two years at least, of all his effects, he shall not be entitled to any benefit under this or the former act.

pay all his debts.—So, if he has lost five pounds at any one time, or one hundred pounds^a, within a twelve month, at any gaming whatever.—So, if a man has been once cleared by a commission of bankruptcy; or has *compounded* with his creditors; or has been delivered by an *act of insolvency* (which is an act occasionally passed by the legislature^o, whereby all persons who are either too low to be objects of the bankrupt laws, or are not in a mercantile state of life, are discharged from all suits and imprisonment, upon delivering up all their effects to their creditors, on oath, at the sessions or assizes; in which case their perjury or fraud is usually punished with death) and afterwards become a bankrupt, and does not pay fifteen shillings in the pound; he is thereby only indemnified as to his person; but any future estate he may acquire remains liable to his creditors, except his tools, necessary apparel, and household goods^p.

THE

^a 11 and 12 G. III. c. 8. sect. 51. three hundred pounds.

^o One of which was enacted in 17 and 18 G. III. c. 14. and is directed to be open to the application of debtors, until the first of May 1780.

^p By 17 and 18 G. III. c. 45. sect. 9. any person who having been a bankrupt and obtained a certificate, shall again become a bankrupt, and not have sufficient to pay his creditors, whatever property he shall acquire subsequent

THE commissioners may, by warrant, direct any house or tenement of the bankrupt's to be broke open, to seize his goods in possession; or his debts and other *choses* in action. And they are to assign over to the assignees all his property, and thereby his estates become as much vested in them as they had been in the bankrupt; and they have the same remedies to recover them (10).

THE commission, when sued out, has *retrospect* to the original act of bankruptcy (11). If an execution be sued out, but not executed on the bankrupt's effects until after the act of bankruptcy, it is void^a, as against the assignees. But the king is not bound by this fictitious relation (12).

By 19 G. II. c. 32. no money paid by a bankrupt to a *bona fide* creditor, even after

quent to his second failure, shall be subject to all such debts as were contracted by him after the time of having first become a bankrupt.

(10) 12 Mod. 324.

(11) 4 Burr. 324.

^a By 11 and 12 G. III. c. 8. sect. 5. a judgment obtained before the bankrupt came under the description of this act, so as to enable him to be a bankrupt, shall remain of full force.

(12) 1 Atk. 262. Viner abr. tit. creditor and bankrupt, 104.

an act of bankruptcy done*, shall be refunded. By 1 Jac. I. c. 15. no debtor that pays a bankrupt without knowing him to be so, shall be liable to pay it again.

THE assignees may pursue any legal means to recover the property, but cannot commence a suit in equity, or compound any debts due to the bankrupt, nor refer any matters to arbitration, without consent of the major part of the creditors in value, at a meeting to be held for that purpose, by notice in the gazette.

THE assignees must, within twelve months, make a *dividend* to such as have before, or shall then prove their debts, of which there must be a notice given twenty-one days before the meeting. And the assignees are to swear to their accounts, if required. The dividend must be rateably, according to the quantity, without regard to the quality. Mortgagees are safe, for the commission of bankrupt reaches only to the equity of redemption (13). So are all personal debts, where the creditor has a

* 11 and 12 G. III. c. 8. sect. 63. if paid before suing forth the commission.

• Ibid. sect. 53. after four, and within twelve months.

(13) Finch. rep. 466. Vid. same stat.

pledge

pledge in his hands, or has taken the bankrupt's lands in execution.

By the equity of 8 Anne, c. 14¹. a landlord shall be paid one year's rent in preference to other creditors, although he hath neglected to distrein, while the goods remained on the premises, which he is otherwise intitled to do for his entire rent, be the *quantum* what it may (14). But else, all debts are on a level. Debts not due at the time of the dividend made, shall be paid equally with the other, deducting therefrom the interest (15). And insurances and obligations on bottomry and *respondentia*, *bona fide*, made by the bankrupt, though forfeited after the commission is awarded, shall be looked on as debts contracted before an act of bankruptcy.

WITHIN eighteen months after the commission is awarded, a second and final dividend shall be made, unless all the effects were exhausted at the first^u. If any surplus remains, it shall be paid to the bankrupt.

¹ 9 Anne, c. 8. sect. 1. (14) 1 Atk. 103, 104.
(15) Lord Raym. 1549.

^u 11 and 12 G. III. c. 8. sect. 57. or unless there remain some effects not yet converted into money, which the assignees are directed to distribute in like manner, within two months after the same shall be converted.

WHERE satisfaction be made to all the creditors, the commission may be *superfeded* (16).

ALTHOUGH the rule is, that all interest shall cease on debts carrying *interest* from the time of issuing the commission, yet in case of a surplus left after paying every debt, such interest shall again revive, and be chargeable on the bankrupt, or his representatives (17).

(16) 2 Ch. cas. 144.

(17) 1 Atk. 244.

C H A P. XXXII.

Title by Testament and Administration.

ALL persons may dispose of their personal effects by will, who are not under some legal prohibition, which is principally for want of sufficient discretion, sufficient liberty and free will, and on account of their criminal conduct.

IN the first species are *infants* under the age of fourteen if males, and twelve if females (1). Madmen, or other *non compos*,—*idiots*, or natural fools,—persons grown childish by old age, or distemper,—such as are besotted with drunkenness,—persons born *deaf*, *dumb*, and *blind*.

OF the second sort are *feme covert*s, who are not only left out of the stat. 34 and 35 Hen. VIII. c. 5^a. and thence incapable of devising lands, but they are also incapable

(1) Godolph.orp. leg. p. 1. c. 8. Wintw. 212. 2 Vern. 104,—469. Gil. rep. 74.

* 10 C. I. sess. 2. c. 2. sect. 30. excludes them from making wills of lands or tenements.

of making a testament of chattels without their husband's licence.—But with their husband's consent they may make a testament (2), which is frequently covenanted for at marriage; yet unless he consents to the particular will, it will not be a complete testament (3); but it shall repel the husband from the general right of administering to his wife, and administration shall be granted to her appointee, with such testamentary paper annexed (4). The queen consort may dispose of her chattels by will, without consent of the king (5). And any *feme covert* may make a will of effects which are in her possession in *auter droit*, as executrix or administratrix (6). If she has any pin-money, or separate maintenance, it is said, she may dispose of it (7). If a *feme sole* makes her will, and afterwards marries, this is esteemed a revocation at law, and vacates the will (8)^b. Prisoners, captives,

(2) Dr. and St. dia. 1. c. 7.

devise 34. Stra. 891.

Bettesworth, T. 13. G. II. B. R.

(6) Godolp. sect. 10.

(8) 4 Rep. 60. 2 P. Wms. 624.

(3) Bro. abr. tit.

(4) The king against

(5) Co. Litt. 133.

(7) Chanc. prec. 44.

^b Any alteration of an estate after a will is made, shews a different intention of the testator, and amounts to a revocation: lord Hardwicke, see Bacon 527. which opinion is well illustrated in the case of the earl of Lincoln, who

tives, and the like, may make their will, but it is at the discretion of the court, whether such persons could have *liberum animum testandi*.

OF the third sort, namely, persons on account of their criminal conduct, are all *traitors* and *felons* from the time of conviction. A *felo de se* cannot make a will of goods and chattels, but he may devise his lands, because they are not liable to any forfeiture (9).—Out-laws, though but for debt; for their goods are forfeited so long as they continue so (10).

TESTAMENTS are divided into two sorts; written, and verbal or nuncupative. The

after having duly made his will, conceived a liking for a lady, (without any prospect of success from her or her friends) and under this fancy made a deed of lease and release of the premises comprised in his will, to trustees, to the use of himself and heirs, till the intended marriage take effect, then to this lady and her heirs, in lieu of dower, as to part, and the rest to the uses therein mentioned. The earl some time after died, and the marriage did not take effect. Upon this will a bill was filed by the heir of the devisee to have a conveyance of the estate; but there was a decree to dismiss the plaintiff's bill; and this alteration was esteemed a revocation. 1 Eq. cas. abr. 411. 2 Free. 202. And on an appeal to the lords, the decree was confirmed. However, this doctrine is held with some exceptions. See Bur. 1256. A mortgage is a revocation *pro tanto* only.

(9) Plowd. 261. (10) Fitz. h. abr. tit. descent. 16.
former

former is committed to writing; the latter depends on oral evidence, being delivered by the testator *in extremis*, before a sufficient number of witnesses, and afterwards reduced to writing.

A *codicil* is a supplement to a will made by the testator, and annexed to, and made part thereof. This also may be written or nuncupative.

By 29 C. II. c. 3^e. no written will shall be revoked or altered by any subsequent nuncupative one, except the same be reduced to writing in the life of the testator, and read over to him and approved, and unless the same is proved by *three witnesses* at the least. No *nuncupative* will shall be good for more than thirty pounds, unless proved by three witnesses present at the making (11); and unless they, or some of them, were specially required to bear witness thereto by the testator; and unless it was made in his last sickness in his habitation, or where he had been previously resident ten days at the least, unless surprized by sickness on a journey, or from home, and dies without returning to his dwelling

^e 7 W. III. c. 12. sect. 6, 18, 19, 20.

(11) 2 Inst. 10, 14.

house. That no nuncupative will shall be proved after six months from the making, unless put in writing within six days; nor shall be proved until fourteen days after the death of the testator; nor until process hath first been issued to call the widow, or next of heir, to contest it, if they think proper^d.

WRITTEN wills, concerning personal estates, need not any witness of their publication. A testament of chattels (of which only we speak here) written in the testator's hand, though it has neither his name or seal, nor witnesses to the publication, is good, provided sufficient proof can be had that it is his hand-writing (12).—And tho' written by another man, and never signed by the testator, yet if proved to be according to his instructions, and approved by him, it hath been held a good testament (13); but it is the safest way to have it signed and sealed by the testator, and published in presence of witnesses.

If there be many testaments, the last overthrows the former (14); but the re-

^d 7 W. III. c. 12. sect. 18, 19, 20.

(12) Godolp. p. 1. c. 21. Gilb. rep. 260.

(13) Comyns, 452, 453, 454.

(14) Litt. sect. 168. Perk. 478.

publication of a former will revokes one of a later date, and establishes the first again (15).

TESTAMENTS may be avoided in three ways. 1st. If made by a person under any of the incapacities before mentioned. 2d. By making another testament of a later date. 3d. By *cancelling* or revoking it.

If a man who hath made his will shall afterwards marry, and hath a child; this is an implied revocation of his former will (16).

WE are now to consider what is an executor and administrator, and how they are to be appointed. An *executor* is one to whom another commits the execution of his last will. All persons are capable to be executors that may make wills, and many others. *Feme* coverts,—infants, even *in ventre sa mere*, may be executors (17).—But no infant can act until he is seventeen years of age. Until which time, administration must be granted to some other *durante minore etate* (18); as it may be granted *durante absentia*, or *pendente lite*, when the

(15) Perk. 479.

(16) Lord Raym. 441.

1 P. Wms. 304.

(17) West. symb. p. i. sect. 635.

(18) Went. off. ex. c. 18.

executor is out of the kingdom (19); or when a suit is commenced in the ecclesiastical court, touching the validity of the will (20).

THE appointment of an executor is essential to making a will (21); and it may be done by express words or by strong implication. If a testator makes a will without naming an executor, or if he names incapable ones; or if, when named, they refuse to act, the ordinary must grant administration *cum testamento annexo* (22).

By 31 Ed. III. and 21 H. VIII. and 29 C. II. c. 3^e. the ordinary is compellable to grant administration of the goods, &c. of the wife to the husband, or his representatives (23); and of the husband, to the widow, or next of heir; but he may grant it to either, or both (24)^f.

OF the kindred, those are to be preferred that are the nearest in degree to the intestate; but of persons in equal degree, the

(19) 1 Lutw. 342. (20) 2 P. Wms. 589, 590.

(21) Went. c. 1. Plowd. 281. (22) 1 Rol. abr. 907. Comb. 20. * 7 W. III. c. 6. sect. 7.

(23) Cro. Car. 106. 1 P. Wms. 381.

(24) Salk. 36. Stra. 532. ^f 28 Hen. VIII. c. 18. sect. 10.

ordinary

ordinary may chuse. This propinquity of degree shall be reckoned by the civilian's computation (25), save only that the children have a preference to the parents of the deceased (26). The *half-blood* is admitted as well as the *whole*. Therefore the brother of the half-blood shall be preferred before the uncle of the whole (27). And the ordinary may admit the sister of the half-blood, or the brother of the whole, at his discretion (28).

If none of the kindred will take out administration, a creditor may (29). If the executor refuses or dies *intestate*, administration may be granted to the residuary legatee in exclusion of the next of kin (30). The ordinary may, in defect of all these, commit the administration to such persons as he approves of; or may grant letters *ad colligendum bona defuncti*, which neither make him executor or administrator; but only to keep the goods in safe custody (31), and to do other acts for the benefit of such as are entitled to the property (32).

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|--------------------------------|---------------------------|
| (25) Prec. chanc. 593. | (26) Godolp. p. 2. c. 34. |
| sect. 1. 2 Vern. 125. | (27) 1 Vent. 425. |
| (28) Aleyn. 36. Styl. 74. | (29) Salk. 38. |
| (30) 1 Sid. 281. 1 Ventr. 219. | (31) Went. c. 14. |
| (32) 2 Inst. 398. | |

If a bastard, or any other who has no kindred, dies *intestate*, or without wife or child, some person procures letters patent, or other authority from the king, and then the ordinary *grants administration* (33).

THE *executor of A's executor* is the executor and representative of A. himself (34). But the executor of A's administrator, or the administrator of A's executors is not the representative of A. (35). So whenever the course of representation is interrupted by one administrator, the ordinary must commit the administration afresh of the goods of the deceased *not administered* by the former executor or administrator, which administrator *de bonis non*, is the legal representative of the deceased.—But he may as well as the original administrator, have a *limited* and *special administration* granted to him of specific effects, the rest being committed to others (36).

AN executor is bound to perform a will; so is an administrator, where a testament is annexed. An executor may do many acts before he proves the will (37); but an ad-

(33) 3 P. Wms. 33.

(34) 1 Leon. 275.

(35) Bro. abri. tit. administ. 7.

(36) 1 Rol. abri.

908. Godolp. p. 2. c. 30. Salk. 36.

(37) Wentw.

c. 3.

ministrator cannot, until letters of administration issued. If a stranger takes upon him to act as executor without any just authority (38), he is called an *executor de son tort*, and is liable to all the trouble, without any of the profits or advantages. But doing acts of necessity, as burying the corpse, locking up papers, or the like, will not charge a man as *executor de son tort* (39). Such a one cannot bring an action in right of the deceased (40);—but they may be brought against him. He is charged with the debts of the deceased, so far as assets come to his hands (41). And against creditors, he shall be allowed all payments made by him to any of an equal or superior degree (42), himself only excepted (43). And though against the rightful executor or administrator, he cannot plead such payment, yet he shall be allowed them in mitigation of damages (44), unless perhaps on deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt (45).

THE rightful executor must bury the deceased in a decent manner, suitable to the

(38) Wentw. c. 14.

(39) Dyer, 166.

(40) Bro. abri. tit. adm. 8.

(41) Dyer, 166.

(42) 1 Chan. cases, 33.

(43) 5 Rep. 30. Moor.

527. (44) 12 Mod. 441, 471.

(45) Wentw. c. 14.

estate he leaves.—Necessary *burial expences* are allowed previous to all other debts; but if the executor or administrator be extravagant, it is a waste prejudicial to himself, and not to the creditor or legatees of the deceased (46). The executor must prove the will of the deceased, by his own oath, before the ordinary or his surrogate; or by *testes*, in more solemn order of law, in case its validity be disputed (47).

WHEN the will is proved, the original must be lodged in the registry, and a copy under the seal of the ordinary made out and given to the executor, with a certificate of its having been proved before him;—all which is called a *probate*^s. At this time, in case of no will, administration must be taken out, and the administrator must, by 22 and 23 C. II. c. 10^h. enter into a bond, with sureties faithfully to execute the trust. If all the goods of the deceased lay in one diocese, a probate or administration from the ordinary are the only proper ones.—But if the deceased had *bona notabilia* in two or more dioceses, to the value of five pounds,

(46) Salk. 196. Godolph. p. 2. c. 26. sect. 2.

(47) Godolph. p. 1. c. 20. sect. 4.

^s By 28 H. VIII. c. 18. the fees to be paid are ascertained.

^h 7 W. III. c. 6. sect. 1.

then

then administration must be granted, or a probate taken out before the metropolitan, whence the office is called the prerogative office (48).

THE executor or administrator is directed by 21 H. VIII. c. 5¹. to make an *inventory* of all the goods and chattels, whether in possession or action, which he is to deliver to the ordinary on oath, if lawfully required.—He is to *collect* all the goods so inventoried, for which he has large powers conferred on him. If there be two or more executors, a sale or release by one shall be good (49); but with administrators, it is otherwise (50). Whatever comes to their hands may be converted into money to answer the demands that may be on them.

THE executor or administrator *must pay* the *debts*. The rules of *priority* must be observed, else on deficiency, if he pays those of lower degree first, he must answer those of a higher out of his own estate. First, he must pay all funeral expences, the expence of proving the will, and the like.—Then *debts due* to the king *on record*, or specialty (51).—

(48) 4 Inst. 335.

(49) Dyer, 23.

(51) 1 And. 129.

¹ 28 H. VIII. c. 18. sect. 12.

(50) Atk. 460.

Next,

Next, such debts as, by particular statutes, are to be preferred to all others; as for letters to the post-office, 9 Anne, c. 10. and the like. Next, debts of record; as judgments, and recognizances (52). Then, debts due on special contract; as rent (53). Lastly, debts on simple contract; as notes unsealed. Among those last, servants wages are considered to be preferred (54).—Among debts of equal degree, the executor or administrator is *allowed* to pay himself first (55).

IF a creditor appoints his debtor an executor, it is a release of the debt, whether the executor acts or no (56), provided there be assets sufficient to pay the testator's debts. If no suit be commenced against an executor or administrator, he may pay any creditor of an equal degree his whole debt (57).

WHEN the debts are all discharged, the legacies must next be paid so far as the assets will go; but here the executor may not give himself the preference (58). If one hath a *legacy* left to him, he cannot take it

(52) 4 Rep. 60. Cro. Car. 363. (53) Wentw. c. 12.

(54) 1 Rol. abri. 927. (55) 10 Mod. 496.

(56) Plowd. 184. Salk. 299. (57) Dyer, 32.

2 Leon. 60. (58) 2 Vern. 434. 2 P. Wms. 25.

without

without consent of the executor (59). In case of deficiency of assets, all the *general* legacies must abate proportionably to pay the debts; but a *specific legacy* is not to abate, unless there be not sufficient without it (60). So if the legatees are paid, they are bound to refund a rateable part; in case debts come in more than sufficient to exhaust the *residuum* (61). If the legatee dies before the testator, the *legacy* is *lapsed*, and shall sink into the *residuum*. If a *contingent legacy* be left to one; as, when he attains, or if he attains the age of twenty one years, if he dies before that time it is a *lapsed legacy* (62); but a legacy to one, to be paid when he attains the age of twenty-one years, is a *vested legacy*; and if he dies before that time, his representatives shall receive it, at the time it would have become payable, had he lived; but if such legacies be charged on a real estate, they shall lapse for the benefit of the heir (63).

IN case of a vested legacy, charged on lands or money in the funds, which yield immediate profit, *interest shall be payable* from the testator's death; but if charged on the

(59) Co. Litt. 111. Aleyn. 39. (60) 2 Vern. 111.

(61) Ibid. 205. (62) Dyer, 59. 1 Eq. cases abri. 295. (63) 3 P. Wms. 601.

personal

personal estate, it shall bear interest only from the end of the year, after the testator's death (64).

THERE is also permitted another death-bed disposition of property, called a donation *causa mortis*; which is, when a person in his last sickness delivers or causes to be delivered to another the possession of any personal goods (under which have been considered bonds, and bills drawn by the deceased on his banker) to keep in case of his decease. This needs not the consent of the executor, but it shall not prevail against creditors. If the donor recovers, it shall return to him (65).

WHEN all debts and legacies are paid, the *residuum* must be paid to the residuary legatee, if any such be appointed by will. If there is not, and the executor has no legacy at all, the *residuum* shall be his own (66); but wherever there is sufficient on the face of the will (67), (by means of legacy or otherwise) to imply that the tes-

(64) 2 P. Wms. 26, 27. (65) Prec. chanc. 269.
 1 P. Wms. 406, 441. 3 P. Wms. 357. (66) Perk.
 525. (67) Prec. chanc. 323. 1 P. Wms. 7, 544.
 2 P. Wms. 338. 3 P. Wms. 43, 194. Stra. 559.

tator intended his executor should *not* have the residue, the undevised surplus shall go to the next of kin.

By 22 and 23 C. II. c. 10^k. the surplusage of intestates estates (except of a *feme covert*, by 29 C. II. c. 3^l. which the husband has a right to enjoy exclusively by the common law) shall, after one full year from the death of the intestate, be distributed one-third to the widow, and the residue in equal portions to the children; or if dead, to their representatives; that is, their lineal descendants. If there be no children or legal *representatives* subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree, and their representatives. If no widow, the whole shall go to the children. If neither widow nor children, the whole shall go to the next of kin in equal degree and their representatives. But no representatives are admitted amongst collaterals farther than the children of the testators brothers, and sisters (68)^m. The next of kindred here referred to are to be investigated by

^k 7 W. III. c. 6. sect. 3, 4, 5.

^l Ibid. sect. 6.

(68) Raym. 496. Lord Raym. 571.

^m 7 W. III. c. 6. sect. 4.

the civil law. But by this statute the mother as well as the father succeeded to their children who died intestate, and without wife or issue, in exclusion of the other sons and daughters, the brothers and sisters of the deceased: and so the law still remains with respect to the father; but, by 1 Jac. II. c. 17^o. if the father be dead, and any of the children die intestate without wife or issue, in the life of the mother, she, and each of the remaining children, or their representatives, shall divide their effects in equal portions. So in the statute of *distributions*, 29 C. II. c. 2^o. directions are given that no child of the intestate (except his heir at law) on whom, in his life-time, he settled any estate in lands or pecuniary portion, equal to the distributive shares of the other children, shall have any of the surplusage with their brothers and sisters; but if the estate so given them is not quite equivalent to the other shares, the children, so advanced, shall now have so much as will make them equal.

SOMETIMES personal estates are divided *per capita*; sometimes by *stirpes*; which latter is the only rule the common law

^a 7 W. III. c. 6. sect. 9.

^o Ibid. sect. 3.

knows

knows of. They are divided *per capita*, when all the claimants claim in their own right.—As if the next of kin to the intestate are his three brothers, A. B. and C.; here his estates are divided into three equal portions; but if A. had been dead, leaving three children, and B. leaving two, then the distribution would be *by stirpes*; one-third to A's three children, another third to B's two, and the remaining third to C.; yet if C. had been dead without issue, then A's and B's five children being all in equal degree to the intestate, would take in their own rights *per capita*, viz. each one fifth part (69).

THE statute of distributions expressly excepts and reserves the *customs of London*, and the province of York, and all other places having particular customs for distribution^p. In London (70), the province of York (71), Scotland (72), and probably Wales, the effects of the intestate, after payment of his debts, are generally divided according to the doctrine of the *pars rationabilis*. If the

(69) Prec. chanc. 54.

^p By the statute of distributions, 7 W. III. c. 6. sect. 11. a special custom is recited and declared to be void.

(70) Lord Raym. 1329. (71) 2 Burn. eccles. law, 746. (72) Ibid. 782.

deceased leaves a widow and children, his substance (deducting her apparel and furniture of her bed-chamber, called in London, the *widow's chamber*) is divided into three parts; one to the widow; one to the children; and one to the administrator. If only a widow, or only children, one moiety to them, and one to the administrator (73). If neither, the administrator shall have the whole (74); which, by 1 Jac. II. c. 17^a, is made subject to the statute of distributions. If the wife be provided for by jointure, she shall be barred of her customary right (75), but not of her share of the part under the statute of distributions, unless barred by special agreement (76). And if any of the children are provided for by the father in his life-time, not amounting to their full proportion, they shall bring such portion into *hatch-potch* with the brothers and sisters; but not with the widow, before they are entitled to any benefit by custom (77).

IN London the share of the children is not vested in them until they are twenty-

(73) 1 P. Wms. 341. Salk. 246. (74) 2 Show 175.
^a 7 W. III. c. 6. sect. 4. (75) 2 Vern. 665.
 3 P. Wms. 16. (76) 1 Vern. 15. 2 Chanc. rep. 252.
 (77) 2 Freem. 279. 1 Eq. cases abri. 155. 2 P. Wms. 526.

one years of age, before which they may not dispose of it by will (78); and if they die under that age, whether sole or married, their share survives to the other children. But after that age, if they die intestate, it goes under the statute of distributions (79).

(78) 2 Vern. 558.

(79) Prec. chanc. 537.

END OF THE FIRST VOLUME.

ST

A

••

Ac

Acti

Addi

Adm

of

Adm

Adm

Adv

Alien

Ame

OF THE

Adapted as much as possible to the STATUTE-BOOK
ALPHABET.

A.

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 — 8 H. VI. c. 12.
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	—	27	E. c. 1. sect. 8.
	ii. c. 15.	— 33	H. VIII. sess. 1. c. 1. sect. 2.
	—	27	E. c. 1. sect. 8.
	II. ii. c. 6.	En. ft. 25	E. III. ft. 5. c. 2.
	—	Ir. ft. 18	H. VI. c. 2.
	—	—	c. 3.
	—	10	H. VII. c. 3.
	—	—	c. 13.
	—	13	H. VIII. c. 1.
	—	28	H. VIII. c. 7. sect. 2.
	—	33	H. VIII. sess. 1. c. 1. sect. 2.
	—	2	A. c. 5. sect. 1.
	—	2	A. c. 7. sect. 1.
	—	4	A. c. 2. sect. 1. made per- petual by 8 A. c. 3.
	—	2	G. I. c. 4. sect. 1.
	—	12	G. II. c. 1. sect. 1.
	ii. c. 17.	— 25	G. II. c. 12. sect. 1.
	—	27	E. c. 1. sect. 8.
	ii. c. 23.	— 28	H. VIII. c. 7. sect. 4.
	ii. c. 27.	— 5	G. III. c. 21. sect. 1.
	ii. c. 28.	— 27	E. c. 1. sect. 8.
Trees,	II. ii. c. 17.	— 10	C. I. sess. 2. c. 23. sect. 1.
	—	7	G. III. c. 23. sect. 1, 2.
	—	17	and 18 G. III. c. 19. sect. 12. and c. 35. sect. 2.
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 ii. c. 17. Ir. ft. 10 C. I. sect. 2. c. 23. sect. 1.
 Trial, I. i. c. 12. En. ft. 20 H. VI. c. 9.
 II. i. c. 23. — 28 E. III. c. 13. sect. 2,
 — 21 H. VI. c. 4.
 Ir. ft. 6 A. c. 10. sect. 6.
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 Tumult, II. ii. c. 11. — 15 and 16 G. III. c. 21. sect. 2.
 continued by 17 and 18 G.
 III. c. 36. sect. 8. until June
 1780.

V. U.

- Vagrants, Poor, } II. ii. c. 2. Ir. ft. 11 and 12 G. II. c. 30. sect. 4.
&c.

Note. By 13 and 14 G. III. c. 46. sect. 21. the acts of 33 H. VIII. c. 15. and 10 and 11 C. I. c. 4. repealed by 11 and 12 G. III. c. 30. are directed to be of force in the counties of Wexford, Armagh, Wicklow, and King's County, until the said 11 and 12 G. III. takes effect in those places.

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|-------------------------------|-----------------|---------------|---------------------------------|-----------------|
| Verdict, special, II. | c. 23. | En. ft. 13 | E. I. c. 30. | sect. 2. |
| Victuals, II. | c. 13. | — | 51 H. III. c. 6. | |
| | | — | 10 E. III. ft. 3. | |
| Violation of safe
conduct, | } II. ii. c. 5. | — | 31 H. VI. c. 4. | |
| Uses, | | I. ii. c. 20. | Ir. ft. 10 C. I. sess. 2. c. 1. | |
| | | ii. c. 21. | — | — sect. 1, — 5. |
| Ufury, | ii. c. 12. | — | 5 G. II. c. 7. | sect. 1. |

W.

- | | | |
|-----------|----------------|---|
| Waste, | I. ii. c. 18. | En. ft. 52 H. III. c. 24. |
| | | — 6 E. I. c. 5. |
| | II. i. c. 8. | |
| | i. 14. | |
| Watchmen, | II. ii. c. 21. | — 13 E. I. c. 4. |
| | | Ir. ft. 6 G. I. c. 10. sect. 2. made per- |
| | | petual by 10 G. I. c. 3. |
| Vol. I. | | Ee |
| | | Weights |

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	ii. c. 19. — sect. 3.
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	— 19 G. II. c. 13. sect. 2.
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	— 12 C. II. c. 32. sect. 2.
	— 10 W. III. c. 10. sect. 1.
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	made perpetual by 11 G. II. c. 9.
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FH

MVSEVM
BRITANNICVM

END OF THE FIRST VOLUME.